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MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping Duty and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Ecuador

DATE: September 8, 2009

Summary

We have analyzed the comments of the interested parties on the preliminary results of the February 1, 2007 – August 14, 2007 administrative review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from Ecuador. As a result of our analysis, we have made changes in the margin calculations for Promarisco S.A. (Promarisco) and Sociedad Nacional de Galapagos, S.A. (Songa) in the final results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from the interested parties:

<u>General Comments:</u>

Comment 1: Offsetting of Negative Margins
Comment 2: Using CBP Data for Respondent Selection
Comment 3: Restricting Count-Size Comparisons Under the Model-Matching Methodology
Comment 4: Assessment Rate Assigned to Companies Receiving the Review-Specific Average Rate
Comment 5: Reporting of Raw Material Costs

<u>Company-Specific Comments:</u>

<u>Promarisco</u>

Comment 6: Use of Adverse Facts Available to Calculate Promarisco's Imputed Credit Expenses
Comment 7: Treatment of Promarisco's Bill of Lading Fees and Analysis and Inspection Fees
Comment 8: Adjustment of Promarisco's Indirect Selling Expenses
Comment 9: Treatment of Promarisco's U.S. and Comparison-Market Billing Adjustments

Comment 10: Payment Date Assigned for Certain U.S. sales
Comment 11: Treatment of Write-offs in G&A Expenses
Comment 12: Treatment of Promarisco's Interest Income Offset
Comment 13: Processing Costs for Block-Frozen Products
Comment 14: Calculation of Entered Value for a Certain U.S. Sale

Songa

Comment 15: Revision of Count-Size Range Model-Match Coding for Certain Head-On Shrimp Products
Comment 16: Completeness of Indirect Selling Expense Reporting
Comment 17: Inclusion of Foreign Exchange Losses in Songa's Financial Expense Ratio
Comment 18: Treatment of Depreciation for Revalued Fixed Assets in Fixed Overhead Costs
Comment 19: Amortization of the Cost of Export Certificates in Financial Expenses
Comment 20: Inclusion of Profit Sharing Expenses in G&A Expenses
Comment 21: Offset Adjustment to G&A Expenses for Certain Non-Operating Income Items

Background

On March 9, 2009, the Department published in the Federal Register the preliminary results of the 2007 administrative review of the antidumping duty order on shrimp from Ecuador. See Certain Frozen Warmwater Shrimp from Ecuador: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 9983 (March 9, 2009) (Preliminary Results).

We invited parties to comment on the Preliminary Results. In May 2009, we received case briefs from domestic producers of the subject merchandise (i.e., the Ad Hoc Shrimp Trade Action Committee, hereafter "Domestic Producers"), the respondents Promarisco and Songa (collectively "the respondents"), and domestic processors of frozen warmwater shrimp (i.e., The American Shrimp Processors Association, hereafter "the Processors"), an interested party in this proceeding. Rebuttal briefs were received from the Domestic Producers, Promarisco, Songa, and the Processors. Based on our analysis of the comments contained in these briefs, we have revised our calculation of the margins for Promarisco and Songa from the margins calculated in the Preliminary Results.

Margin Calculation

We calculated export price (EP) and normal value (NV) using the same methodology described in the Preliminary Results, except as follows below:

- We recalculated imputed credit expenses on Promarisco's sales to Spain and the United States, as described in Comment 6.
- We treated Promarisco's reported bad debt expense incurred on unpaid sales as a direct selling expense and allocated that expense to all U.S. sales, as described in Comment 8.
- We revised Promarisco's indirect selling expenses to exclude analysis and inspection fees, which we treated as direct selling expenses, as discussed in Comment 7; and to

include an accounts payable balance difference, which we reclassified from Promarisco's general and administrative (G&A) account, as described in Comment 8.

- We corrected the conversion costs reported in Promarisco's cost database to reflect the verified production quantities for the freezing and packing cost center, as discussed in Comment 13.
- We revised the entered value for one Promarisco U.S. sale, as described at Comment 14.
- We revised the count-size coding for certain Songa head-on shrimp products, as discussed in Comment 15.
- We replaced Songa's reported surrogate costs for products not produced during the POR with surrogate costs based on the Department's model-match methodology, as described in the memorandum entitled "Cost of Production and Constructed Value Calculation Adjustments for the Final Results – Sociedad Nacional de Galapagos S.A." (Songa Cost Calculation Memo).
- We revised Songa's indirect selling expense calculation to include certain additional selling expenses. See Comment 16.
- We revised Songa's financial expense rate to reverse adjustments made at the preliminary results, which related to the amortization of exchange rate loss and the amortization of the cost of export certificates. See Comment 17 and 19, respectively. We added the amortization of the cost of the export certificates to the recalculation of the indirect selling expenses. See Comment 19.
- We revised Songa's G&A expense rate to include value-added tax (VAT) refund fees paid and to allow an offset for certain income items, as discussed at Comment 21.
- We calculated a single, weighted-average assessment rate for Songa's importers, correcting an error in the Preliminary Results where we calculated separate assessment rates for Songa's two importers of record. The error was identified by Songa at pages 53-54 of its May 1, 2009, case brief.

Discussion of the Issues

General Comments

Comment 1: *Offsetting of Negative Margins*

In the preliminary results, we followed our standard methodology of not using non-dumped comparisons to offset or reduce the dumping found on other comparisons (commonly known as "zeroing"). The respondents maintain that the World Trade Organization (WTO) has found that "zeroing" in administrative reviews is inconsistent with Articles 2.4 and 9.3 of the Antidumping Agreement and Article VI:2 of the General Agreement on Tariffs and Trade (1994). As support for this assertion, they cite United States – Measure Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (January 9, 2007) (U.S. – Zeroing (Japan)), and United States – Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/R (April 18, 2006) (U.S. – Zeroing (EC)). The respondents note that the Department has already eliminated its practice of "zeroing" in investigations in response to WTO rulings. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722, 77723 (December 27, 2006) (Zeroing Notice). Therefore, they contend that the Department should acknowledge the WTO decisions and not use the "zeroing" methodology to calculate their margins in this review.

The Domestic Producers and the Processors maintain that the Department should continue its practice of "zeroing" for the final results of this review. According to the Processors, the statute requires "zeroing" because, under Section 771(35)(B) of the Act, a comparison of NV and U.S. price that results in a negative value cannot be used to reduce or eliminate dumping margins. The Domestic Producers and the Processors further assert that the Court of Appeals for the Federal Circuit (CAFC) has held that the Department's practice of "zeroing" in administrative reviews is a reasonable interpretation of the Act. As support for this assertion, they cite Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008); SKF USA Inc. v. United States, 537 F.3d 1373, 1382 (Fed. Cir. 2008); Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken I); and Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), cert. denied, 546 U.S. 1089 (2006) (Corus I). According to the Domestic Producers, the Department has modified its calculation of the weighted-average dumping margin only when making average-to-average comparisons in investigations. See Zeroing Notice at 77724.

Moreover, the Domestic Producers contend that the Department has repeatedly declined to modify its "zeroing" methodology in any proceeding other than an investigation, including administrative reviews,[1] and it has repeatedly rejected arguments similar to those of Promarisco and Songa in numerous recent administrative reviews.[2] The Domestic Producers, citing NSK Ltd. v. United States, 510 F.3d 1375, 1380 (Fed. Cir. 2007) (NSK) and Corus Stall BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II), additionally maintain that the CAFC recently affirmed the Department's use of "zeroing" in administrative reviews.

Additionally, citing to Alexander Murray v. Schooner Charming Betsey, 6 U.S. 64, 118 (1804), the Processors note that Congress has enacted a process to adopt WTO decisions, and there has not yet been any decision at the Congressional level to adopt the WTO's rulings on zeroing in administrative reviews. Finally, the Processors argue that a departure from the Department's practice of "zeroing" in administrative reviews would be contrary to the statements of the United States before the WTO, citing Final Antidumping Measures on Stainless Steel from Mexico, WT/DS344/11 Communication from the United States (June 12, 2008). Consequently, the Domestic Producers and the Processors argue that the Department should continue to employ its "zeroing" methodology in the calculations for the final results.

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[1] In support of this assertion, the Domestic Producers cite several administrative determinations, including Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part, 73 FR 15132 (March 21, 2008), and accompanying Issues and Decision Memorandum at Comment 2; and Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review, 72 FR 71357 (December 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

[2] In support of this assertion, the Domestic Producers cite several administrative determinations, including Granular Polytetrafluoroethylene Resin From Italy: Final Results of Antidumping Duty Administrative Review, 74 FR 14519 (March 31, 2009), and accompanying Issues and Decision Memorandum at Comment 10; and Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review, 73 FR 75398 (December 11, 2008), and accompanying Issues and Decision Memorandum at Comment 1.

Department's Position:

We have not changed our calculation of the weighted-average dumping margin, as suggested by Promarisco and Songa, in these final results.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than EP or constructed export price (CEP). We agree with the Domestic Producers and the Processors that the Department's zeroing practice is an appropriate interpretation of the Act. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. As the Domestic Producers and the Processors note, the CAFC has held that this is a reasonable interpretation of the statute. See, e.g., Timken I, 354 F.3d at 1342; and Corus I, 395 F.3d at 1347-49.

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices or constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel out the dumping margins found on other sales.

This methodology does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the period of review (POR): the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

The respondents have cited WTO dispute-settlement reports finding the Department's "zeroing" methodology to be inconsistent with the Antidumping Agreement. As an initial matter, the United States Court of Appeals for the Federal Circuit (CAFC) has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act (URAA). See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; and NSK, 510 F.3d at 1380. While the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations, the Department has not adopted any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See Zeroing Notice at 77724.

With respect to US-Zeroing (Japan), Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19 USC 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g); see also Zeroing Notice at 77724. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure. With regard to US-Zeroing (Japan), it is the position of the United States that appropriate steps have been taken in response to that report and those steps do not involve a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review. Furthermore, in response to US-Zeroing (Japan), the CAFC has repeatedly affirmed the permissibility of denying offsets in administrative reviews. See Corus II, 502 F.3d at 1374-75; and NSK, 510 F.3d at 1380. With respect to US-Zeroing (EC), such WTO reports are not self-executing under U.S. law and there has been no implementation action taken by the United States pursuant to U.S. law that would require the Department to adopt a different methodology in this instance.

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, the Department has continued to deny offsets to dumping based on EPs that exceed NV in this review.

For the foregoing reasons, we have not changed the methodology employed in calculating Promarisco's or Songa's weighted-average dumping margins for the final results.

Comment 2: *Using CBP Data for Respondent Selection*

In our initiation notice, we stated that we intended to select respondents for individual review in this proceeding based upon U.S. Customs and Border Protection (CBP) entry data, and we invited interested parties to comment on our respondent selection methodology. See Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India and Thailand: Notice of Initiation of Administrative Reviews, 73 FR 18754, 18765 (April 7, 2008) (Initiation Notice). In determining which producers/exporters accounted for the largest volume of imports of subject merchandise, we relied on CBP entry data for all "type 3" (i.e., AD/CVD entries for consumption) entries of frozen warmwater shrimp from Ecuador entering under the United States Harmonized Tariff Schedule (HTS) numbers included in the scope of the antidumping duty order on certain frozen warmwater shrimp from Ecuador. See the April 9, 2008, memorandum to the file, entitled, "Release of POR Entry Data from CBP" (CBP Data Release). After releasing the relevant CBP entry data to interested parties and analyzing comments, we selected the two largest producers/exporters according to CBP entry data as the mandatory respondents in this administrative review. For further discussion, see the May 27, 2008, memorandum entitled "Selection of Respondents for Individual Review" (Respondent Selection Memo).

The Domestic Producers argue that the Department impermissibly relied on CBP entry data for purposes of selecting mandatory respondents in this administrative review because CBP data is inaccurate. Specifically, the Domestic Producers contend that the CBP data is unreliable and its accuracy has been questioned in other instances before the Department, as the data is compiled from CBP Form 7501 (CF-7501) entry summary forms, which the Domestic Producers allege are prone to errors and inconsistencies.

The Domestic Producers also contend that use of CBP data to select respondents is contrary to the Department's practice, which is to issue quantity and value (Q&V) questionnaires to respondents in order to determine which respondents to select for mandatory review.[3] The Domestic Producers claim that the Department did not provide adequate explanation for why it departed from this practice despite the fact that the courts have required the Department to explain changes in practice. In support of this assertion, the Domestic Producers cite NSK, 510 F.3d at 1381 and Save Domestic Oil, Inc. v. United States, 357 F.3d 1278, 1283 (Fed. Cir. 2004), which, according to the Domestic Producers, stands for the proposition that the Department must either follow its settled practice or provide an explanation for why it has departed from it. The Domestic Producers also assert that the Department has not explained why Q&V questionnaires are an appropriate basis for selecting mandatory respondents in some reviews but not others. To demonstrate this inconsistency, the Domestic Producers cite Initiation of Antidumping Duty Administrative Review, 74 FR 8776, 8777 (February 26, 2009) (where the Department selected respondents based upon Q&V questionnaires in the most recently initiated administrative review of wooden bedroom furniture from the People's Republic of China). The Domestic Producers argue that, in order to correct these deficiencies, the Department must issue Q&V questionnaires to all respondents in this review.

Finally, the Domestic Producers maintain that the Department must also make "type 1" (i.e., entries of shrimp not covered by the antidumping duty order) CBP entry data, available to parties, in addition to the "type 3" CBP entry data that it did provide to parties, in the event that it continues to find it appropriate to use CBP data to select respondents. Further, the Domestic Producers urge the Department to take any corrective action necessary if it discovers that its reliance on CBP data resulted in the selection of mandatory respondents in a manner inconsistent with 777A(c)(2)(B) of the Act.

We received no rebuttal comments on this issue.

Department's Position:

We continue to find that it was appropriate to base our respondent selection decision on CBP data. Where it is not practicable to examine all known exporters/producers of subject

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[3] In support of this assertion, the Domestic Producers cite such administrative determinations as Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Final Partial Rescission of the Second Administrative Review, 73 FR 12127 (March. 6, 2008) (Shrimp from Vietnam Preliminary Results), unchanged in Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 52273 (September 9, 2008) (Shrimp from Vietnam Final Results); and Notice of Preliminary Results and Preliminary Partial Rescission of the Antidumping Administrative Review: Petroleum Wax Candles From the People's Republic of China, 68 FR 53109 (September 9, 2003), unchanged in Notice of Final Results and Rescission, in Part, of the Antidumping Duty Administrative Review: Petroleum Wax Candles From the People's Republic of China, 69 FR 12121 (March 15, 2004).

merchandise, section 777A(c)(2)(B) of the Act permits us to examine "exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined." In this review, the Department exercised its discretion under section 777A(c)(2)(B) of the Act and selected the top two producers/exporters for individual examination. As outlined above, in determining which two producers/exporters accounted for the largest volume of imports of subject merchandise, we relied on CBP entry data for all "type 3" entries of frozen warmwater shrimp from Ecuador entering under the HTS numbers included in the scope of the antidumping duty order on certain frozen warmwater shrimp from Ecuador. See CBP Data Release.

Although the Domestic Producers allege that the individual entry forms are subject to human error, and therefore that the data in the aggregate may be inaccurate, the Domestic Producers have not presented any evidence demonstrating that inaccuracies existed in the CBP data at issue here. Rather, the Domestic Producers' argument relies solely upon speculation that errors may have occurred. We also note that the Domestic Producers make no argument of error based upon the information provided by the respondents in their responses on the record. It is well established that mere speculation does not constitute substantial evidence, which is the standard for reviewing an agency finding. See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States, 40 F. Supp. 2d 466 (CIT 1999) at 471- 472; Stainless Steel Sheet and Strip in Coils From Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review, 73 FR 6932 (February 6, 2008), and accompanying Issues and Decision Memorandum at Comment 1. Absent any evidence of error with respect to the CBP data pertaining to this case, we find no basis to reject the CBP data here.

We note that the Domestic Producers also raised their concerns over the use of CBP data prior to the selection of respondents in this case, and we addressed them in our Respondent Selection Memo. Specifically, we stated:

> The CBP data on which the Department's respondent selection methodology is based represents reliable data on entries of subject merchandise readily available to the Department. The data is compiled from actual entries of merchandise subject to the order based on information required by and provided to the U.S. government authority responsible for permitting goods to enter into the United States. Further, the entries compiled in this database are the same entries upon which the antidumping duties determined by this review will be assessed.

See the Respondent Selection Memo at page 4.

Moreover, significant penalties can be imposed on parties that report entry information inaccurately. See 19 USC 1592. Accordingly, we continue to find that CBP data is sufficiently reliable to use for purposes of respondent selection.

We also disagree that the Department failed to provide adequate explanation for why it chose to rely on CBP data instead of Q&V questionnaires to determine the largest exporters/producers of subject merchandise. We stated our intention to use CBP data in the Initiation Notice, where we said:

> We intend to release the CBP data under administrative protective order (APO) to all parties having an APO within five days of publication of this Federal Register notice, and to make our decisions

> regarding respondent selection within 20 days of publication of this notice. The Department invites comments regarding the CBP data and respondent selection within 10 days of publication of this Federal Register notice.

See Initiation Notice at 18765 - 18766. As noted above, following that announcement we received and analyzed comments from interested parties, and issued a reasoned memorandum in which we addressed the very concerns expressed here by the Domestic Producers. See the Respondent Selection Memo.

In any event, we disagree that we departed from Department practice in selecting mandatory respondents based upon CBP data. Section 777A of the Act does not require the Department to use any specific method for determining which producers/exporters account for the largest volume of subject merchandise. Rather, section 777A(c)(2)(B) of the Act requires the Department to examine "exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined." The Act is silent as to how the Department is permitted to determine which exporters and producers account for the largest volume of subject merchandise, and the Department has discretion to choose which particular method to use in determining which respondents account for the largest volume of the subject merchandise. While the Department has selected respondents based upon Q&V questionnaires in certain proceedings based on case-specific facts,[4] the Department's current practice is to select respondents using CBP data,[5] which the Department determines accurately identifies the two producers/exporters accounting for the largest volume of imports of subject merchandise that could reasonably be examined in this review.

Moreover, while we acknowledge that the Department relied on Q&V data to select respondents in prior segments of this proceeding, selecting respondents from CBP data provides an alternative that is much more administratively practicable, given that relying on Q&V responses in this proceeding requires significant resources to send and track the delivery of Q&V questionnaires and responses, and to aggregate and analyze the numerous responses.

Although we are rejecting the Domestic Producers' argument on its merits, additionally we note that it would be impossible to issue Q&V questionnaires at this late stage of the review and complete the review within the statutory deadline. Specifically, at the case brief stage, it is too late in the review to issue Q&V questionnaires, receive and analyze the responses from the 81 respondents in the review, perform a new respondent-selection exercise, and potentially conduct a full review of those respondents. Further, as noted above, the Domestic Producers have provided no evidence of error in CBP data.

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[4] See, e.g., Shrimp from Vietnam Preliminary Results, 73 FR at 12128, unchanged in Shrimp from Vietnam Final Results, 73 FR 52273.

[5] See, e.g., Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 73 FR 37409 (July 1, 2008); Initiation of Antidumping and Countervailing Duty Administrative Reviews, 73 FR 70964 (November 24, 2008); Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 74 FR 12310 (March. 24, 2009); Initiation of Antidumping and Countervailing Duty Administrative Reviews, 74 FR 25711 (May 29, 2009).

Regarding the Domestic Producers' request that the Department release "type 1" entry data, we disagree that the release of this data is warranted in this case. Indeed the Domestic Producers do not articulate a reason for the Department to do so. Further, the Domestic Producers have put forth no evidence that would indicate these "type 1" entries were misreported to CBP as entries of non-subject merchandise, or that there has otherwise been any systematic misclassification of entries which would cast doubt upon the veracity of the CBP data as a whole. Therefore, we continue to find that it was appropriate to base our respondent selection decision on CBP data of "type 3" entries.

Comment 3: *Restricting Count-Size Comparisons Under the Model-Matching Methodology*

In the less-than-fair-value (LTFV) investigation, the Department defined "models" of shrimp by reference to 14 physical characteristics, one of which was count size. We also placed these 14 physical characteristics in a hierarchy, with count size as the third characteristic, which was then used to determine which foreign products were most similar to U.S. products. The Department relied on this hierarchy without alteration in all subsequent segments of this proceeding, as well as in all segments of the companion proceedings on shrimp from Brazil, India, and Thailand.

In their case brief, the Processors argue that the Department's methodology for model-matching does not yield representative or accurate product comparisons, because it permits the comparison of shrimp products of widely different count sizes. According to the Processors, count size is the primary factor determining price; thus they argue shrimp in count sizes which differ by more than one count-size range (e.g., 10-12 shrimp per lb., 16-20 shrimp per lb., 21-25 shrimp per lb., etc.) cannot be reasonably compared because the difference-in-merchandise adjustment does not adequately capture the difference in value between these products. Therefore, the Processors request that the Department revise its model-matching methodology to reflect the importance of count-size to the price of shrimp by limiting the permissible variance in count-size in matched models to one count-size range.[6]

In support of their assertion that count size is an important factor influencing the price of shrimp, the Processors cite to information from the original investigation demonstrating that shrimp is generally traded by size. See Certain Frozen and Canned Warmwater Shrimp from Ecuador: Final Determination of Sales at Less Than Fair Value, 69 FR 76913 (December 23, 2004) (LTFV Final Determination) and accompanying Issues and Decision Memorandum at Comment 28; also Certain Frozen and Canned Warmwater Shrimp from India: Final Determination of Sales at Less Than Fair Value, 69 FR 76916 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 4. Further, the Processors analyzed data from both respondents in this administrative review and maintain that these data demonstrate that count size is an important factor in the differences of the cost and price of frozen warmwater shrimp. The Processors contend that, because there is no limit on the extent to which specific product characteristics can differ in this proceeding (except as constrained by the difference-in-merchandise test), dissimilar merchandise may be treated as the most similar match. Thus, the

[6] For example, the Processors claim that shrimp in the count-size range of 9 or less shrimp per lb. (i.e., with a count-size range code of "01") should only be matched to shrimp of the same count-size range or of a count-size range of no more than 10-12 shrimp per lb. (i.e., with a count-size range code of "02").

Processors argue that, changing the model-matching methodology to limit the count-size ranges deemed similar will produce more accurate and reliable margins.

According to the Processors, the United States Court of International Trade (CIT) has held that the Department must choose the most similar merchandise for comparison purposes when more than one product meets the definition of similar merchandise. See Timken Company v. United States, 630 F. Supp. 1327, 1337 (1986) (Timken II). The Processors contend that this ruling is consistent with the mandate in the statute to make fair, "apples to apples" comparisons and to achieve the most accurate results. As support for this assertion, the Processors cite Hussy Copper, Ltd. V. United States, 834 F. Supp. 413, 417 (CIT 1993) (citing, inter alia, Smith Corona Group v. United States, 713 F.2d 1568, 1578 (Fed. Cir. 1983)).

The Processors note that the Department has the discretion to update and revise its model-matching methodology as appropriate based on new information, changes in the industry, and improvements in the Department's own technological capabilities. See, e.g., Koyo Seiko Co Ltd. v. United States, 516 F. Supp. 2d 1323 (CIT 2007) (Koyo Seiko) (affirming the Department's change to the model-matching methodology based in part on technological advances permitting selection of the single most-similar model rather than reliance on averaging groups of models together); Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 64 FR 56759, 56769 (October 21, 1999) (Pipes and Tubes from Thailand) (changing the product matching criteria to reflect a wider array of sizes sold); and Roller Chain, Other than Bicycle, from Japan: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 62 FR 60472, 60475 (November 10, 1997) (Roller Chain from Japan) (reviewing and modifying the model-matching methodologies employed in prior segments of the proceeding).

The Processors assert that the Department should change its model-matching methodology in this case to weigh the relative significance of the physical characteristics of the product, consistent with its stated intent in the preamble to the Department's regulations. See Antidumping Duties; Countervailing Duties, Final Rule, 62 FR 27296, 27378 (May 19, 1997). The Processors assert that adopting this type of change would be in line with the Department's practice in other cases. Specifically, the Processors argue that in Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 70 FR 54711 (September 16, 2005) and accompanying Issues and Decision Memorandum at Comment 2, the Department has required closer matches for more fundamental characteristics, while allowing wider deviation for less fundamental characteristics.

The respondents contend that the Processors' proposal to "radically alter" the model-matching methodology by restricting the matches using the count-size criterion is untimely and should be rejected on that basis. The respondents cite a number of case precedents to demonstrate the Department's longstanding and consistent practice to decline consideration of model-match methodology changes that an interested party fails to raise early in a proceeding, such as Notice of Final Results of Antidumping Duty Administrative Reviews and Determination Not To Revoke in Part: Certain Corrosion-Resistant Carbon Steel Flat Products and Cut-to-Length Carbon Steel Plate From Canada, 66 FR 3543 (January 16, 2001), and accompanying Issues and Decision Memorandum at Clayson Comment 1; and Notice of Final Results of the Eleventh

Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 71 FR 7513 (February 13, 2006), and accompanying Issues and Decision Memorandum at Comment 1. In this instance, the respondents note that the Processors did not raise their model-matching issue until the submission of their case brief and therefore, the respondents conclude, it is far too late for the Department to consider the issue.

Moreover, the respondents assert that the Processors fail to satisfy the "compelling reasons" test, as articulated in such cases as Fagersta Stainless AB v.United States, 577 F. Supp. 2d 1270 (CIT 2008) (Fagersta),[7] because the Processors do not provide any basis to demonstrate that their proposal achieves any improvement in accuracy. Therefore, the respondents contend that the Department cannot conclude that there is a compelling reason for the Processors' proposed model-match change.

Department's Position:

We agree with the respondents that it would be inappropriate to make such a substantial, or fundamental, change in the model-matching methodology at this late stage in the administrative review. During the LTFV investigation in this proceeding, the Department, in consultation with all parties, established the physical characteristics to be used in the model-matching hierarchy in all of the concurrent antidumping duty investigations involving shrimp. See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 47091, 47094 (August 4, 2004), unchanged in LTFV Final Determination; and Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 47100, 47103 (August 4, 2004), unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 76918 (December 23, 2004). In this administrative review, the Department issued questionnaires based on the same model-matching hierarchy as in the investigation (and all prior administrative reviews) and all parties fully responded to the questionnaire. The Processors raised no objection to the Department's model-matching methodology either prior to the issuance of these questionnaires or in the context of supplemental questionnaire responses. Although the Processors argue that re-examining the model-matching hierarchy is now warranted in this case, such re-examination would be a fundamental change that would affect all parties participating in this proceeding and in the companion proceedings on frozen warmwater shrimp from Brazil, India, and Thailand.

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[7] "Once Commerce has established a model-match methodology in an antidumping investigation, it will not modify that methodology in subsequent proceedings unless there are "compelling reasons" to do so…. A party seeking to modify an existing model-match methodology has alternative means to demonstrate that "compelling reasons" exist to do so. Commerce will find that "compelling reasons" exist if a party proves by "compelling and convincing evidence" that the existing model-match criteria "are not reflective of the merchandise in question," that there have been changes in the relevant industry, or that "there is some other compelling reason present, which requires a change." See Fagersta at 1276-1277.

We note that the issue of revising the model-matching methodology has been raised by the Processors for the first time in this review during the briefing stage, timing which stands in marked contrast to the cases the Processors cited as support for their position.[8] In Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 69 FR 55574 (September 15, 2004) and accompanying Issues and Decision Memorandum at Comment 2, the Department declined to consider the issue of making a fundamental change to the model when it was first raised in the an earlier administrative review. Instead, the Department decided to allow further time for comment and analysis of the issue in the context of the next administrative review and to ensure that all parties in the companion bearings cases were provided ample opportunity to consider and provide comment on the proposed change to the model-match methodology because it would, as here, affect the model-matching methodology in all companion cases. Further, we find that the Processors' reliance on Roller Chain from Japan to be misplaced because in that case, the Department made changes to the model-matching methodology in the preliminary results, which provided the Department sufficient time to solicit comments from all interested parties. See Roller Chain from Japan at 60473.

As our practice demonstrates, the Department addresses arguments for changes to the model-matching methodology when raised early in a proceeding so that all parties have sufficient opportunity to comment and address any reporting issues which may result from such changes. See, e.g., Honey From Argentina: Final Results of Antidumping Duty Administrative Review, 69 FR 30283 (May 27, 2004), and accompanying Issues and Decision Memorandum at Comment 15 (declining to address arguments for changing the model-matching methodology raised for the first time in the case brief); Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From Romania: Final Results of Antidumping Duty Administrative Review and Final Determination Not To Revoke Order in Part, 70 FR 7237 (February 11, 2005) and the accompanying Issues and Decision Memorandum at Comment 10 (stating that arguments on the model-matching methodology should be presented early in the case); Structural Steel Beams from Korea; Notice of Final Results of Antidumping Duty Administrative Review, 70 FR 6837 (February 9, 2005), and accompanying Issues and Decision Memorandum at Comment 1 (noting that parties were invited to comment early in the third administrative review on model-matching changes which initially had been raised too late in the second administrative review).

In order to modify the model-matching methodology, pursuant to the requirements of section 782(g) of the Act, the Department must allow "reasonable opportunity" for interested parties to comment. See Koyo Seiko, 516 F. Supp. 2d at 1333. By raising its proposed alterations to the model-matching methodology at the briefing stage of the review, the Processors did not allow the Department sufficient time to solicit comments from all parties, to properly consider the issue, including clarifying aspects of the Processors' proposal and the information and basis that supports the proposal, and to make a reasonable determination on the basis of comments from all parties. Therefore, we have continued to rely on our established model-matching methodology in this case.

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[8] The timing, as well as the impact, of the Processors' proposal also contrasts with the count-size range coding issue raised by Songa in this review. See Comment 15 below.

Comment 4: *Assessment Rate Assigned to Companies Receiving the Review-Specific Average Rate*

As the assessment rate for companies not selected for individual examination, we stated in the Preliminary Results that, "we {would} calculate an assessment rate based on the weighted average of the margin rates calculated for the companies selected for individual examination excluding any which are de minimis or determined entirely on AFA." See Preliminary Results at 9991.

The Domestic Producers disagree with the Department's preliminary assessment rate calculation methodology for the companies not selected for individual review. The Domestic Producers quote language from 19 CFR 351.212(b)(1) stating that the Department normally will "calculate the assessment rate by dividing the dumping margin found on the subject merchandise by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise." According to the Domestic Producers, because the Department has neither a calculated dumping margin nor the entered value of subject merchandise for the companies not selected for individual examination, it must employ a proxy to determine the assessment rate for the non-examined companies. While the Domestic Producers agree that the dumping margins calculated on Promarisco's and Songa's sales of the subject merchandise is the correct proxy for the dumping margin for sales of the subject merchandise sold by the non-examined companies, the Domestic Producers argue that it is grossly inappropriate for the Department to use the respondents' U.S. sales value as the proxy for the entered value of subject merchandise sold by the non-examined companies. Thus, the Domestic Producers contend that the Department's assignment to non-examined companies of a liquidation rate directly equal to the margin rate assigned to those companies directly contradicts 19 CFR 351.212(b)(1) and, thus, that the methodology should be changed for the final results.

Further, the Domestic Producers contend that assigning a liquidation rate to the non-examined companies equal to the margin rate results in differential treatment to these companies and provides an incentive for foreign companies to request administrative reviews with the intention of avoiding individual examination by the Department. Therefore, for the final results, the Domestic Producers request that the Department base the liquidation rate assigned to the non-examined companies on the weighted-average assessment rates calculated for Promarisco and Songa, in accordance with 19 CFR 351.212(b)(1).

Promarisco and Songa state that the Domestic Producers' argument should be rejected because there is no statutory, regulatory, or Department precedent for determining an antidumping duty liquidation rate for the unexamined companies based on the weighted-average assessment rates calculated for the examined respondents. The respondents add that the Domestic Producers' proposal would involve a policy change that would affect all administrative reviews. Accordingly, they assert that a change in the assessment rate practice can only be made on a prospective basis, after providing public prior notice and an opportunity for comment.

Department's Position:

We have continued to base the assessment rate for companies not selected for individual examination on the average of the mandatory respondents' margins (exclusive of de minimis margins or margins based entirely on facts available (FA)). As the Domestic Producers correctly note, for the companies not selected for individual examination, we do not have the information on the record to determine either the calculated dumping margin or the entered value of subject merchandise during the POR. Further, 19 CFR 351.212(b)(1) is silent as to which methodology the Department should use to calculate the assessment rate for non-examined companies. Thus, we believe that the average of the mandatory respondents' margins (excluding any margin, which are de minimis or based entirely on FA) is a reasonable proxy for the assessment rate to be applied to the non-examined companies.

Our consistent practice in every administrative review of this order, as the well as in each of the companion shrimp orders on Brazil, India, and Thailand, has been to use the calculated margins of the respondents selected for individual review to determine the assessment rate for the non-examined companies. See, e.g., Certain Frozen Warmwater Shrimp from Ecuador: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 39945, 39947 (July 11, 2008) (AR2 Final Results); Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52061, 52065 (September 12, 2007); Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review 74 FR 33409, 33413 (July 13, 2009); and Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 50933, 50938 (August 29, 2008). In addition, in several other recent proceedings, we have based the assessment rate for non-examined companies on the average dumping margins of respondents selected for individual review. See, e.g., Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 64580, 64582 (November 16, 2007); and Certain Lined Paper Products from India: Notice of Final Results of the First Antidumping Duty Administrative Review, 74 FR 17149, 17153 (April 14, 2009).

Although the Domestic Producers have requested that we depart from this practice, as the respondents note, the Domestic Producers have provided no valid reason for the Department to do so. Specifically, the Domestic Producer's reliance on 19 CFR 351.212(b)(1) is misplaced because this section of the regulations does not address the calculation of an assessment rate for companies which have not submitted full questionnaire responses. Rather, 19 CFR 351.212(b)(1) merely provides guidance on the computation of the assessment rate for mandatory respondents participating in an administrative review. Therefore, we have continued to calculate the assessment rate for companies not selected for individual examination based upon the average of Promarisco's and Songa's margins for purposes of the final results.[9]

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[9] In the final results, we calculated the assessment rates applicable to the companies not selected for individual examination to reflect the simple average of the margins calculated for Promarisco and Songa, rather than the weighted average of these rates, as discussed in the Federal Register notice, which this memorandum accompanies.

Comment 5: *Reporting of Raw Material Costs*

The Domestic Producers argue that the Department should revise Promarisco's and Songa's reported costs, which are currently calculated on a product-specific basis (as identified by control number, or CONNUM), so that products which are identical but for the product characteristic of container weight[10] share the same raw material (i.e., raw shrimp) costs. According to the Domestic Producers, the cooked status, head status, finished count size, shell status, tail status and species of a finished product all affect the yield of the raw shrimp used to produce the finished shrimp product, but without regard to container weight. Furthermore, with respect to Songa, the Domestic Producers add that the Department should rely on the revised recalculated raw shrimp costs for head-on products obtained at verification (SHRIMP2), which excludes Songa's consideration of raw shrimp grade in its calculation of CONNUM-specific costs, because the grade of raw shrimp is not a product-matching characteristic in this proceeding.

In support of their position, the Domestic Producers assert that it is the Department's practice to require that all products sharing the same physical characteristics have the same reported cost, regardless of where, when or how the products were produced. The Domestic Producers cite among other cases a previous segment of the proceeding, Certain Frozen Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review, 72 FR 52070 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 6 (AR1 Final Results), where the Department did not accept a company's reporting of raw material costs that included a timing factor. Thus, the Domestic Producers continue, products that differ only in a physical characteristic that has no impact on raw material costs, such as container weight, should have the same reported raw material costs as they are otherwise physically the same. The Domestic Producers state that the Department encountered a similar situation in Stainless Steel Bar from the United Kingdom: Final Results of Antidumping Duty Administrative Review, 72 FR 43598 (August 6, 2007), and accompanying Issues and Decision Memorandum at Comment 1 (UK Bar), where the Department rejected the respondent's billet-specific costs and relied on weighted-average billet costs because the billet-specific costs appeared to distort costs due to factors that were unrelated to the physical characteristics of the input. As an additional example, the Domestic Producers point to Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 46584 (August 11, 2008), and accompanying Issues and Decision Memorandum at Comment 18 (OJ from Brazil), where the Department refused to accept variable cost differences that were unrelated to physical differences in products, particularly where they were unrelated to differences in the raw material yields to produce the finished product.

The Domestic Producers further argue that it is not sufficient for two products to differ physically in order for their raw material costs to differ legitimately. They contend that, for a reported raw material cost difference between two CONNUMs to be legitimate and appropriate, the physical difference between the CONNUMs must result in a manufacturing cost difference.

[10] The Domestic Producers treated this product characteristic as business proprietary information in their case brief because their analysis relied on information obtained under an Administrative Protective Order. However, in the public version of the consolidated Promarisco and Songa rebuttal brief, the respondents revealed the nature of the product characteristic. Therefore, we have treated this information as public information.

In the case of raw shrimp, the Domestic Producers state it would be reasonable for raw material costs to differ between shrimp of different count sizes, but not between shrimp products that differ solely with respect to container weight.

Moreover, in the case of Songa, the Domestic Producers and the Processors argue that the Department cannot accept raw shrimp costs that take into account a characteristic not part of the Department's model-matching methodology, which is the grade of raw shrimp. The Processors point out that the Department determined at verification that Songa tracks its cost by grade, which is not a physical characteristic in the Department's model-matching methodology. Therefore, to obtain the appropriate raw shrimp costs, the Domestic Producers and the Processors assert that the Department should rely on Songa's SHRIMP2 costs obtained at verification, which do not account for differences in grade, and recalculate a new weighted-average raw shrimp cost for each CONNUM.

Promarisco and Songa contend that the Domestic Producers' proposed raw material cost methodology constitutes a major reversal of the Department's policy because it represents a change to the Department's practice of requiring that respondents report CONNUM-specific costs. The respondents note that the Department's standard antidumping duty questionnaire specifically instructs respondents to report and support cost information on a CONNUM-specific basis. Thus, the respondents assert, the Domestic Producers are effectively seeking a wholesale policy change with respect to the calculation of the reported cost, which would require that the Department analyze each model-match characteristic in each antidumping duty proceeding to determine whether it has an effect on the raw material cost. This procedure, the respondents add, would impose an impossible administrative burden and at any rate, if it were to be implemented, it should be only on a prospective basis. Promarisco and Songa state that to reject their CONNUM-specific cost methodology in this administrative review would upset their legitimate expectations that the Department would apply the same cost calculation methodology that it has applied in every prior segment of this proceeding.

Both respondents assert that they demonstrated in their responses and at verification that their inventory accounting systems allow them to trace the specific raw materials that they consumed in the production of each CONNUM during the period of review (POR), including the raw shrimp used to produce shrimp products packed into specific containers. Promarisco and Songa state that they demonstrated at their respective verifications that products that have identical CONNUMs, except for container weight, may be produced from different mixes and/or grades of raw shrimp. Promarisco and Songa note that, while the Domestic Producers object to accounting for container weight in calculating raw material costs in the instant review, they advocated the inclusion of this factor in the underlying LTFV investigation, as discussed in <u>LTFV Final Determination</u> at Comment 3. Furthermore, both respondents point out that the differences in container weight correlate to the size of shrimp produced and packed in a particular size grouping. Thus, to accept the Domestic Producers' methodology, the respondents continue, would result in a distortion of the direct relationship between price and cost, where the Department would accept differences in a physical characteristic for purposes of identifying identical or similar merchandise, but reject that same physical characteristic for calculating cost, a difference-in-merchandise adjustment, or constructed value.

Promarisco and Songa maintain that the cases cited by the Domestic Producers do not support the position they advocate. The respondents assert that in AR1 Final Results, the Department affirmed that a respondent must calculate its raw shrimp costs based on the physical characteristics incorporated in a CONNUM. The respondents assert further this is what they have done in this review by calculating their raw material costs on a CONNUM-specific basis. On the other hand, in UK Bar, Promarisco and Songa contend that the issue was that the respondent had not calculated its raw material cost on a CONNUM-specific basis, but rather on a job order basis, which included differences other than the physical characteristics established in that case for model-matching purposes. Finally, with respect to OJ from Brazil, Promarisco and Songa state that the respondent in that case took the same erroneous approach as in UK Bar by calculating its raw material costs differently for the same physically identical finished product. In contrast, they assert that shrimp in different size containers, and consequently with different CONNUMs, are physically different and accordingly may have different raw material costs, as the Department has observed in this proceeding. The respondents cite AR2 Final Results at Comment 5, where the Department attested that "different mixes of shrimp count sizes used as inputs to produce the same value-added products (differing only in the weight of the container used to market the finished product) could result in different yields."

Regarding the Domestic Producers' contention that Songa's raw material costs should be based on the SHRIMP2 amounts, Songa responds that it finds no basis for substituting these costs for the CONNUM-specific costs it reported. Songa states that the Domestic Producers are incorrect in claiming that Songa included grade into its cost calculation; rather, although Songa pays different prices for different grades of raw shrimp it purchases, it reported a single, weighted-average raw material cost for each CONNUM. Further, Songa asserts that it demonstrated at verification that its raw material cost methodology is not distortive. Accordingly, Songa maintains that the Department should rely on its reported raw material costs, rather than the SHRIMP2 alternative.

Department's Position:

We disagree with the Domestic Producers that container weight does not have an impact on the raw material costs. We also disagree with the Domestic Producers and the Processors that, with respect to Songa, we should rely on the revised recalculated raw shrimp costs for head-on products obtained at verification (SHRIMP2). Section 773(f)(1)(A) of the Act states that "costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." The Department will rely on a company's normal books and records which are kept in accordance with the home country's generally accepted accounting principles if they reasonably reflect the cost to produce and sell the merchandise. See AR2 Final Results at Comment 5, and Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement in the Antidumping Duty Order, 74 FR 22885 (May 15, 2009), and accompanying Issues and Decision Memorandum at Comment 10.

In Promarisco's case, because it paid different prices for different grades of shrimp, and because its cost accounting system tracks the cost of each grade separately, Promarisco's CONNUMs may include multiple products that have different raw material costs. See Promarisco's August 1, 2008, response to section D of the Department's questionnaire (QRD) at pages D-19 – D-20. As a result, Promarisco CONNUMs that are identical in all respects except for container weight may have different shrimp costs due to varying grades purchased of the same-size input shrimp. We observed at verification that Promarisco's grade B shrimp purchases were a very small percentage of the total shrimp purchased. See the Department's Memorandum dated April 17, 2009, entitled "Verification of the Cost Response of Promarisco S.A. in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Ecuador" (Promarisco Cost Verification Report) at page 18. To ascertain the significance of the grade B cost differences for a selected CONNUM, we calculated the difference between the raw shrimp cost for the CONNUM reported based on Promarisco's normal accounting system records and the raw shrimp cost for that CONNUM had the raw shrimp cost been averaged across grades. As a result of this testing, we found a very small difference for the tested CONNUM, which would have an insignificant impact on the reported cost.

With respect to Songa, its "presentation" (i.e., customer-specific packaging and specifications) incorporates the different input shrimp size combinations that it packs for its individual products that make up the CONNUM. Songa has different "presentations" for each finished product (see the Department's Memorandum dated April 8, 2009, entitled "Verification of the Cost Response of Sociedad Nacional de Galapagos, S.A. in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Ecuador" (Songa CVR) at page 9). Thus, different container weights will be made up of different mixes of input shrimp sizes and result in different raw material costs. Songa relied on its normal accounting system for reporting the product-specific detailed costs, for materials and presentation, of the different products they produce. Songa's normal accounting system forms the basis for its audited financial statements prepared in accordance with Ecuadorian GAAP.

Both respondents' accounting systems track the mix of input shrimp sizes that make up the packaged product, and the actual price paid for the raw shrimp is reflected and captured in the reported costs. Therefore, Promarisco's and Songa's reported raw material costs reasonably reflect the cost of the merchandise under consideration.

We agree with the respondents that the cases cited by the Domestic Producers do not support their position. In AR1 Final Results, the Department found that the costs reported by the respondent, using its normal books and records, were distortive because they created cost differences not associated with differences in the physical characteristics as defined by the Department. The Department also found that the POR-wide average raw material cost for the respondent's value-added products was based on the finished shrimp count size reported, not the cost for the shrimp count sizes that went into producing each value-added product. The record demonstrates that Promarisco's and Songa's respective reported cost differences are associated with differences in the physical characteristics as defined by the Department, and the reported raw material cost for their value-added products was based on the annual average cost for the shrimp count sizes that went into producing each value-added product. In UK Bar, the Department found that the costs reported by the respondent, using its normal books and records, were distortive. The respondent in that case assigned a specific billet purchase price to each job order within a CONNUM, and because it produced and sold each product only a limited number of times during the cost reporting period, the specific billet costs did not represent the unit cost normally experienced by the company to produce the product during that time period. In this case, the record shows that Promarisco's and Songa's reported costs per CONNUM reflect the annual weighted average of the specific raw materials used to produce each CONNUM. In OJ from Brazil, the Department found that the company assigned a different cost of manufacture (COM) to the identical intermediate orange juice product used to produce each of the final orange juice products (i.e., FCOJM, NFC or Dairy Pak), depending on which product the company produced at different times of year, and the random quality difference of the input oranges throughout the year. As a result, the reported cost differences between products were not limited to the differences in the physical characteristics of the products produced. As we mentioned above, the record in this case shows that Promarisco's and Songa's reported cost differences are associated with differences in the physical characteristics as defined by the Department.

As for the Domestic Producers' argument that Songa reported different costs for different grades of shrimp, we disagree. As we noted in Songa CVR at page 19, while Songa pays and records different costs for the different grades of shrimp that it buys, it reported "a single cost per CONNUM that is the weighted average of the specific raw materials used to produce each CONNUM." In the "Summary of Issues" section at page 2 of the Songa CVR, we stated that the raw material cost was based on "head form, Songa count-size, grade and presentation." However, this statement was inaccurate with respect to grade. Since verification, we have further analyzed and recalculated the reported raw material costs from the POR's Purchases of Raw Material Liquidation Report (see CVR at Exhibit D1, pages 1-5,) and have determined that Songa did not include grade in its raw material cost calculation (i.e., Songa did not report a separate raw material cost for each grade of shrimp used to produce each CONNUM). Therefore, for the final results, we have relied on Songa's reported raw material costs, as verified by the Department, to calculate Songa's cost of production (COP).

Comment 6: *Use of Adverse Facts Available to Calculate Promarisco's Imputed Credit Expenses*

As discussed in the Preliminary Results, the Department recalculated the imputed credit expenses for Promarisco's U.S. and Spanish sales by assigning payment dates based on adverse facts available (AFA).[11] The Department performed the recalculations in this manner because at verification it found that: a) Promarisco's payment arrangements for its sales were not fully disclosed prior to verification; and b) there were numerous payment date discrepancies between the reported dates and the dates established at verification, including multiple payment dates applicable to certain sales which were not identified prior to verification. In particular, at verification, the Department learned for the first time in this review that Promarisco had an arrangement with some of its banks, whereby the bank releases to Promarisco funds equal to most or all of the invoice value due from a sale in advance of the customer's actual payment to the bank. This arrangement was not described in any of Promarisco's questionnaire responses submitted prior to the sales verification. As a result, the Department determined in the

[11] Specifically, for sales to the United States, the Department calculated imputed credit expenses based on the longest period between shipment date and payment date either reported in the U.S. sales database, or observed at verification. For sales to Spain, the Department calculated imputed credit expenses using the shortest period between shipment date and payment date either reported in the Spanish sales database, or observed at verification.

Preliminary Results that Promarisco had failed to cooperate to the best of its ability in providing information relevant to the calculation of imputed credit expenses, and therefore applied AFA to recalculate these expenses.

Promarisco claims that the Department's Preliminary Results decision to apply AFA was unwarranted because Promarisco acted to the best of its ability in responding to all of the Department's information requests and properly reported its payment arrangements with its customers, and, with only minor errors, the appropriate payment dates. According to Promarisco, the Department's claim that Promarisco did not disclose the full range of payment arrangements applicable to its sales during the POR is not due to Promarisco's failure to cooperate or explain its payment process, but rather due to the Department's misunderstanding or disregard of record evidence. Promarisco claims that it reported all the information required and requested by the Department regarding its payment process in its August 1, 2008, response to Sections B, C and D of the Department's questionnaire (Promarisco QRBCD), including the date on which Promarisco's bank made the funds from the sale available to Promarisco by posting the payment to Promarisco's account in advance of the customer payment. According to Promarisco, this short-term financing arrangement with its bank associated with its working capital needs was completely separate from its sales payment arrangements with its customers, and the cash advances from the bank were not tied to the customer payment to the bank. Promarisco notes further that it properly included the short-term interest expenses incurred on its borrowings in its calculation of the short-term interest rate used to calculate imputed credit expenses and inventory carrying costs, as well as in its calculation of the net financing expense reported in its submitted COP database.

Promarisco insists that its use of its accounts receivable as collateral for its short-term financing needs was not relevant to the questions that the Department asked in its questionnaire regarding payment dates, which were to be reported based on the payment dates indicated in its normal business records (i.e., the customer payment dates). Promarisco asserts that it fully responded to the Department's inquiries regarding its customer payment arrangements, and it was not reasonable for the Department to expect that Promarisco would interpret the Department's payment date questions as requiring it to describe the use of its accounts receivable as collateral for securing short-term financing. To support its position, Promarisco cites Agro Dutch Industries Limited v. United States, Slip Op. 07-185 (December 26, 2007) (Agro Dutch), where the CIT held that "{a} complete answer that is responsive to the question asked but which does not answer the question Commerce (erroneously) assumed it had asked cannot lawfully be considered the respondent's 'deficiency' or a 'not satisfactory' remedial response thereto."

Promarisco states that it properly reported, and the Department verified, the actual dates on which the customer transmitted payment to Promarisco's bank. Further, Promarisco contends that, because there is no linkage between the cash advances it received from the bank and the customer payment, there is no basis to consider any date other than the customer payment date, such as the cash advance date, as the appropriate payment date. Accordingly, Promarisco claims that there is no basis to apply AFA for Promarisco's alleged failure to disclose its payment arrangements.

Promarisco further argues that, while it made some errors in its reporting of payment dates, the errors were inadvertent and minor, and do not rise to a level that warrants application of AFA. In support of this contention, Promarisco provides a detailed discussion of the sales examined at verification and concludes that the payment date discrepancies are minor. Promarisco claims that applying the verified payment dates of the examined sales to the recalculation of imputed credit expenses results in a difference of less than 0.10 percent from Promarisco's reported imputed credit expenses for the examined sales. Because this difference is insignificant, Promarisco contends that the Department may accept Promarisco's reported amounts under section 777A(a)(2) of the Act and 19 CFR 351.413 (Department may decline to take into account adjustments which are insignificant – less than 0.33 percent ad valorem). More importantly, Promarisco maintains that the insignificance of its alleged payment date errors further demonstrates that the application of a punitive AFA in this case is excessive and inconsistent with CIT decisions in Krupp Thyssen Nirosta GmbH v. United States, 25 CIT. 793, 800-01 (2001) (the Department must consider "the impact the errors have on the data" when deciding whether to apply an adverse inference), and Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 865 F. Supp. 857, 865 n.22 (Ct. Int'l Trade 1994), aff'd, 68 F.3d 487 (Fed. Cir. 1995) (an adverse inference is not appropriate if a minor or insignificant adjustment is involved or the gap in the record is inadvertent).

In addition to challenging the bases described above for applying AFA to recalculate Promarisco's imputed credit expenses, Promarisco also argues that AFA cannot be applied because, contrary to the Department's conclusion in the Preliminary Results, Promarisco acted to the best of its ability to provide the requested information and to cooperate with the Department. Promarisco agrees with the Department's reliance on Nippon Steel Corp. v. United States, 337 F.3d 1373 (Fed. Cir. 2003) (Nippon Steel) in the Preliminary Results in considering whether AFA is appropriate, but disagrees with the Department's interpretation of that case, asserting that Nippon Steel does not support the application of AFA to penalize a respondent's failure to provide any type of information, no matter what the reason for that failure. Promarisco also states that Nippon Steel holds that the Department may only draw an adverse inference when the agency could reasonably expect that the respondent should have provided more or better information in its responses. See Nippon Steel at 1383. Promarisco stresses that it fully cooperated throughout the course of this review, as well as in previous segments of this proceeding, and submitted numerous questionnaire responses. Accordingly, Promarisco contends that the Department has improperly penalized Promarisco for not describing financing arrangements that were not relevant to the establishment of the proper payment date and for making a few clerical errors with respect to its reported payment dates that, individually and collectively, were minor.

If the Department decides to adjust the imputed credit expenses for the sales not individually examined at verification because of the minor errors discovered at verification, Promarisco proposes that the Department apply a neutral facts available methodology, such as the ones discussed in its case brief,[12] as an alternative to AFA. Promarisco notes several court cases that point to the Department's responsibility to calculate accurate margins based on a respondent's data and not to apply facts available in an unduly punitive manner, including Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004), and F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000). Therefore, for the reasons discussed above, Promarisco concludes that the Department should reverse its decision to apply

[12] See page 26 and Exhibits 1 and 2 of Promarisco's May 1, 2009, case brief.

AFA to its payment dates and imputed credit expense calculations, and, at most, apply a neutral facts available adjustment methodology in the final results.

Both the Domestic Producers and the Processors argue that the Department properly applied AFA to recalculate Promarisco's imputed credit expenses because Promarisco failed to fully and accurately describe the manner in which it received payment for its sales of the subject merchandise. In so doing, the Domestic Producers and the Processors contend that Promarisco misled the Department, failed to cooperate to the best of its ability in providing information to the Department, and significantly impeded this proceeding. The Domestic Producers dispute Promarisco's assertions that its accounts receivable financing arrangements are irrelevant to the calculation of imputed credit expenses. Rather, the Domestic Producers state that the intent of calculating imputed credit expenses is to capture the implicit cost of financing a respondent's accounts receivables, or, put another way, to measure the opportunity cost associated with the delayed payment of a sale to a customer. The imputed credit expense ceases to exist, the Domestic Producers continue, once the seller receives payment for the sale, whether directly from the customer or from a middleman, such as a bank. Thus, contrary to Promarisco's claims, the Domestic Producers contend that the payments Promarisco received from its banks are very relevant to the calculation of imputed credit expenses. Because Promarisco failed to even mention its accounts receivable financing arrangements until the sales verification, the Domestic Producers state that the Department was unable to fully examine those arrangements, thus precluding the Department from accurately determining Promarisco's imputed credit expenses.

The Domestic Producers further challenge Promarisco's claim that its accounts receivable financing arrangements are completely separate from its customer payments by arguing that the amounts received by Promarisco from its bank were functional equivalents of payments for accounts receivables. The Domestic Producers note the connection Promarisco makes between the bank advances and the invoices used as collateral for them. Further, the Domestic Producers highlight that nearly all of the money Promarisco receives in connection with a sale occurs when the bank provides its cash advance; Promarisco does not repay the cash advances to the banks, nor does it receive the money from the customer. According to the Domestic Producers, it is irrelevant whether Promarisco's customer is involved in the accounts receivable financing arrangements, or whether the proceeds for a sale are paid by the customer or a bank. Rather, the Domestic Producers contend that the relevant fact is when Promarisco was paid for each sale so that the opportunity cost to Promarisco between shipment date and payment date can be properly measured. Here, the Domestic Producers conclude, Promarisco did not have to wait for the customer to pay because it received the revenue associated with its invoiced sale at the time of the cash disbursement from the bank; thus, Promarisco's attempts to separate accounts receivable financing from customer payments are without merit.

In addition, the Domestic Producers contest Promarisco's representations concerning the reporting of payment dates and support the Department's finding at verification that most of the payment dates examined at verification were incorrectly reported. The Domestic Producers note that, in some cases, Promarisco relied on a different methodology than the Department, as Promarisco maintained that the appropriate payment date was the date the customer paid the bank, while the Department considered as payment date the date that the bank advanced Promarisco the value of the sale invoice. In any event, the Domestic Producers assert that the record clearly demonstrates that the majority of the payment dates examined at verification were incorrectly reported and, accordingly, the Department's application of AFA was justified.

The Processors also refer to the payment date discrepancies discovered at verification in support of the Department's use of AFA in the Preliminary Results. The Processors emphasize that the Department correctly determined that 1) Promarisco possessed the requested and necessary payment information but failed to report it, and 2) Promarisco did not put forth its maximum effort to respond to the Department's information request. Thus, they continue, the use of AFA was consistent with section 776(a)(2)(A) and (B) of the Act, and the Nippon Steel standard, which, inter alia, "does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping." See Nippon Steel at 1382. Among the examples of previous determinations where the Department applied AFA when a respondent did not act to the best of its ability to respond to the Department's information request, the Processors cite in particular Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa, 62 FR 61731, 61739 (November 19, 1997), where the Department determined that the respondent did not act to the best of its ability to comply with the Department's request to provide verifiable U.S. sale payment dates.

Similarly, the Domestic Producers refer to the Nippon Steel standard in characterizing Promarisco's withholding of information regarding its accounts receivable financing arrangements as another basis for demonstrating that Promarisco failed to act to the best of its ability to provide requested information to the Department. The Domestic Producers add that in withholding important information concerning payments, Promarisco misreported many of the actual payment dates. Thus, the Domestic Producers assert that Promarisco is incorrect to claim that the Department applied AFA for Promarisco's "lack of perfection;" rather the Department applied AFA for Promarisco's failure to disclose the manner in which it received payment for its sales. Moreover, the Domestic Producers argue that it was reasonable for the Department to expect that Promarisco should interpret the Department's questionnaire request for payment date data to take into account the accounts receivable financing arrangements, particularly as such arrangements are relevant to the determination of imputed credit expenses, as discussed above.

Finally, both the Domestic Producers and the Processors cite additional precedents for the Department's application of AFA when a respondent does not fully disclose relevant information. The Domestic Producers cite to Universal Polybag Co., Ltd. v. United States, 577 F. Supp. 2d 1284 (CIT 2008), where the CIT rejected the respondent's claim that it had responded to the Department's inquiries in the form and manner permitted, and upheld the Department's use of AFA for discrepancies discovered during verification. The Processors also refer to Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2003-2004 Administrative Review and Partial Rescission of Review, 71 FR 2517 (January 17, 2006), and accompanying Issues and Decision Memorandum at Comment 16, where the Department noted that the respondent failed to provide all relevant data prior to verification, despite ample opportunity to do so, and instead left the Department to discover the errors on its own at verification.

<u>Department's Position</u>:

We have reconsidered the application of AFA in recalculating Promarisco's imputed credit expenses, as discussed further below. For the final results, we have recalculated imputed credit expenses for the sales examined at verification based on information obtained at verification, and applied that information to the remaining sales as facts available under section 776(a) of the Act.

The Act at section 776(a) states:

> In general, if (1) necessary information is not available on the record, or (2) an interested party or any other person –
> (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of this title,
> (C) significantly impedes a proceeding under this subtitle, or
> (D) provides such information but the information cannot be verified as provided in section 782(i) of this title,the administering authority and the Commission shall subject to section 782(d) of this title, use facts otherwise available in reaching the applicable determination under this subtitle.

Promarisco argues that it did not disclose its accounts receivable financing system because it was not specifically requested to do so by the Department and thus Promarisco properly reported payment dates as the date of customer payment, as required by the Department's original questionnaire. Moreover, Promarisco contends that its accounts receivable financing system is not relevant to the reporting of payment dates.

Promarisco is mistaken in arguing that information concerning its accounts receivable financing system is irrelevant to the Department's analysis. The Department necessarily must have an understanding of a respondent's financial system in order to properly utilize the data reported for purposes of calculating an accurate antidumping duty margin. Here, Promarisco acknowledges at page 12 of its May 1, 2009, case brief that it relied on the interest expense derived from its accounts receivable financing system to calculate its short-term interest rate, which, in turn, is a key component of the imputed credit expense calculation. Accordingly, this information is relevant to the Department's margin analysis in this review. In addition, we note that Promarisco's customers are instructed to pay the same bank that offers Promarisco accounts receivable financing, rather than pay Promarisco directly (<u>see</u>, <u>e.g.</u>, page 2 of Sales Verification Exhibit (SVE) 26). Thus, contrary to Promarisco's assertions, an understanding of its accounts receivable financing system was necessary for analyzing and verifying customer payment dates.

Here, Promarisco's failure to fully disclose, in advance, both its accounts receivable financing arrangements and the multiple payments made for some sales impeded the Department's ability to verify payment dates as part of the sales verification. The relatively large proportion of discrepancies observed at verification between the reported payment date and the payment date according to bank documents, in combination with the absence of advance explanation of Promarisco's accounts receivable financing arrangements and multiple payments for certain sales, resulted in considerable confusion as to the appropriate payment date to consider for calculating Promarisco's imputed credit expenses.

However, after consideration of the interested party comments, and additional review of the record, including further examination of the relevant verification exhibits, we determine that it is appropriate to recalculate Promarisco's imputed credit expenses based upon the facts otherwise available under section 776(a)(1) of the Act without making an adverse inference. In other words, we have reconsidered our application of AFA with respect to the recalculation of Promarisco's imputed credit expenses because we find that Promarisco did not fail to cooperate to the best of its ability, and thus no adverse inference is warranted under section 776(b) of the Act.

Our analysis supports Promarisco's reliance on customer payment date for calculating imputed credit, given its accounts receivable financing system and the methodology it used to calculate the short-term interest rate. Specifically, we observed that Promarisco's accounting records did not credit the accounts receivable opened for a sale until Promarisco's bank records receipt of customer payment (see, e.g., bank statement page (recording customer payment) and journal transaction page (showing accounting ledger postings for the payment) in SVE 14). Based on our understanding of Promarisco's customer payment arrangements and accounts receivable financing system, we find that Promarisco's imputed credit calculation methodology, including its calculation of the short-term interest rate, is reasonable.

Nevertheless, because of Promarisco's omission in reporting prior to verification that some sales were paid by the customer in multiple installments, we are unable to identify which of the unexamined sales were paid in that manner, and what proportion of the invoice balance was paid in each installment. In addition, because of the number of payment date discrepancies observed at verification with respect to the examined sales,[13] we must continue to account for these differences as they may impact the calculation of imputed credit expenses for the unexamined sales.[14] Accordingly, we recalculated the imputed credit expenses for all sales not examined at verification based on the facts otherwise available under section 776(a) (1) of the Act. As facts available, we made an adjustment to the payment dates for the unexamined sales based on our verification findings, consistent with our approach in Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Duty Administrative Review, 66 FR 13896, 13901 (March 8, 2001), where two respondents did not fully report payment arrangements prior to verification and the Department recalculated the imputed credit expenses based on the verification findings.

Specifically, we recalculated Promarisco's imputed credit expenses in the following manner:

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[13] As part of our review, we now agree with Promarisco that, consistent with its customer payment date methodology, there is no discrepancy for two sales identified in its case brief at pages 16 and 17, as TC4 and US2, respectively. See the memorandum entitled "Promarisco S.A., Final Results Notes and Margin Calculation" (Promarisco Sales Calculation Memo) for details.

[14] Promarisco suggests that, under section 777A(a)(2) of the Act and 19 CFR 351.413, the Department may ignore insignificant adjustments to the imputed credit expense calculation. However, these sections refer to price adjustments as a whole, not differences in payment date. The Department is instructed to make circumstances-of-sale adjustments for credit expenses under 19 CFR 351.410(c), and thus, 19 CFR 351.413 would not apply to this expense.

- For the sales examined at verification, we used the customer payment date according to our verification results. For the U.S. sale with multiple customer payments which we examined at verification, we used the latest payment date; for the comparison-market sale with multiple customer payments which we examined at verification, we used the earliest payment date.
- For the unexamined comparison-market sales, we assigned a payment date by comparing the difference between the reported customer payment date, as revised by Promarisco at verification, to the date verified by the Department for each comparison-market sale or invoice examined at verification for which we have full payment information. We calculated the simple average of the difference between the reported payment date and actual payment date for the comparison-market sales examined. We then applied the result to the reported number of days between shipment date and payment date for the unexamined sales. If this application resulted in a payment period less than zero days, we set the recalculated number of days to zero.
- For the unexamined U.S. sales, we assigned a payment date by comparing the difference between the reported customer payment date, as revised by Promarisco at verification, to the payment date verified by the Department for each U.S. market sale or invoice examined at verification for which we have full payment information. We calculated the simple average of the difference between the reported payment date and the actual payment for the U.S. sales examined. We then applied the result to the reported number of days between shipment date and payment date for the unexamined sales.
- For those U.S. sales which we verified were unpaid by the customer, we assigned the payment date equal to December 31, 2007. <u>See</u> Comment 10 below for further discussion.

<u>See</u> the Promarisco Sales Calculation Memo for further explanation of the imputed credit expense recalculation.

Comment 7: *Treatment of Promarisco's Bill of Lading Fees and Analysis and Inspection Fees*

In the <u>Preliminary Results</u>, we reclassified Promarisco's reported bill of lading fees originally included in its indirect selling expense calculation as movement expenses incurred on U.S. and comparison-market sales. In addition, we treated analysis and inspection fees, which were omitted from the U.S. and comparison-market sales databases, as direct selling expenses, based on our verification findings and information provided by Promarisco at verification.

Promarisco contends that neither of these expenses meets the definition of direct expenses under 19 CFR 351.410(c) because the expenses do not "result from, and bear a direct relationship to, the particular sale in question." According to Promarisco, it cannot individually trace either the costs of preparing bills of lading or the analysis and inspection fees to specific, individual sales and therefore, both sets of expenses should be treated as indirect selling expenses. With respect to the analysis and inspection fees, Promarisco acknowledges that the Department treated these expenses as direct selling expenses in the LTFV investigation (<u>see</u> <u>LTFV Final Determination</u> at Comment 6), but states that, unlike during the period of investigation, when Promarisco incurred these expenses on a shipment-specific basis, during this POR Promarisco contends that it incurred them periodically, without regard to a particular shipment. Further, Promarisco claims that the Department incorrectly stated in the sales verification report that the analysis and inspection fees were not included in Promarisco's calculation of indirect selling expenses because according to Promarisco's review of the questionnaire responses and relevant sales verification exhibits, these expenses were included in the calculation.

The Domestic Producers and the Processors respond that the Department appropriately reclassified the bill of lading fees as movement expenses because these fees are clearly related to the movement of the merchandise, and the Department has consistently treated such expenses as movement expenses (see, e.g., Canned Pineapple Fruit from Thailand: Preliminary Results of Antidumping Duty Administrative Review, 73 FR 45695, 45696 (August 6, 2008)). The Domestic Producers continue that while Promarisco's inability to tie the bill of lading fees to specific sales may affect the allocation of the expense, it does not change the nature of the fees as movement expenses.

With respect to the analysis and inspection fees, the Processors note that Promarisco acknowledged in its questionnaire responses and case brief that these fees are incurred only in connection with the exports of its merchandise. Thus, unlike indirect selling expenses, which are incurred regardless of whether or not sales are made, the Processors assert that the analysis and inspection fees are thus directly related to Promarisco's sales. Therefore, the Processors conclude, the analysis and inspection fees are properly treated as direct selling expenses.

Department's Position:

We disagree with Promarisco and have continued to treat Promarisco's bill of lading fees as movement expenses, and analysis and inspection fees as direct selling expenses, consistent with our practice as discussed below.

Direct selling expenses are defined under 19 CFR 351.410(c) as "expenses, such as commissions, credit expenses, guarantees, and warranties that result from, and bear a direct relationship to, the particular sale in question," whereas indirect expenses are fixed expenses that are incurred whether or not a sale is made. Promarisco contends that because it cannot individually trace either the costs of preparing bills of lading or the analysis and inspection fees to specific, individual sales or shipments, then the expenses in question cannot be shown to bear a direct relationship to a particular sale and thus should be treated as indirect selling expenses. However, the fact that Promarisco is unable to track these fees on an individual sale or shipment basis alone does not change the nature of the expenses.

With respect to the bill of lading fees at issue, we agree with the Domestic Producers that Promarisco's inability to trace these fees to specific sales merely affects the way the expenses are allocated, not the nature of the fees as movement expenses. As in prior segments of this proceeding, and in other cases, the Department has classified bill of lading fees more appropriately as movement expenses, as they bear a direct relationship to the shipment of the subject merchandise. See, e.g., LTFV Final Determination at Comment 6; and Notice of Final Results of Antidumping Duty Administrative Review and Final Determination Not To Revoke Order in Part: Canned Pineapple Fruit From Thailand, 65 FR 77851 (December 13, 2000), and accompanying Issues and Decision Memorandum at Comment 5 (Pineapple from Thailand).

With respect to the analysis and inspection fees at issue, Promarisco argues that during this POR it incurred these expenses periodically without regard to a particular shipment, but periodic payment also does not change the nature of the expenses. We agree with the Domestic Producers and the Processors that the analysis and inspection fees are only incurred in connection with the exports of the subject merchandise, and thus should be treated as direct expenses. See, e.g., Pineapple from Thailand. Promarisco itself describes the analysis and inspection fees in its May 1, 2009, case brief at page 35, as "expenses related to periodic testing of shrimp products that Promarisco incurs on its exports." Therefore, in accordance with 19 CFR 351.410(c), and consistent with the LTFV Final Determination, we determine that these expenses would not have been incurred if the sale had not been made and thus result from, and bear a direct relationship to, the sale of subject merchandise.

Upon further review of Promarisco's indirect selling expense calculation, we agree with Promarisco that the analysis and inspection fees are included in the reported indirect selling expenses. Accordingly, we recalculated Promarisco's indirect selling expenses to exclude these fees in order to avoid double-counting them in the margin calculation.

Comment 8: *Adjustment of Promarisco's Indirect Selling Expenses*

In the Preliminary Results, the Department excluded certain expenses from Promarisco's financial expenses because it reclassified them as selling expenses. The Domestic Producers state that, while the Department excluded these expenses from the financial ratio calculation, it failed to add them to the indirect selling expense calculation. Accordingly, the Domestic Producers assert that the Department should recalculate the indirect selling expense ratio for the final results to include these expenses.

Promarisco responds that the Department should reject the Domestic Producers' arguments because the two sets of expenses at issue are not actually selling expenses. According to Promarisco, one of the expense items relates to unpaid invoices associated with a U.S. customer that ties to sales included in the Department's margin calculations; the other expense item refers to an accounts payable balance difference. With respect to the unpaid invoices, Promarisco contends that it would be double-counting to include the sales in the margin calculation and the unpaid invoice amount in the calculation of indirect selling expenses. With respect to the accounts payable balance difference, Promarisco states that the amount is an accounting adjustment Promarisco made after reconciling its accounts with the bank and cannot be considered a selling expense. Therefore, Promarisco asserts that no recalculation of the indirect selling expense ratio is warranted.

Department's Position:

We disagree with Promarisco that the accounts payable balance difference cannot be considered a selling expense. At verification and as detailed in the Promarisco Cost Verification Report at Exhibit 17, Promarisco explained that the accounts payable balance difference is related to sales activities rather than the procurement of raw materials or the production of the merchandise under consideration; therefore, it is properly treated as an indirect selling expense. Details of the adjustment in question include business proprietary information and are discussed further in the memorandum entitled "Cost of Production and Constructed Value Calculation Adjustments for the Final Results - Promarisco, S.A." (Promarisco Final Results Cost Calculation Memo).

We agree with Promarisco, in part, with respect to the unpaid invoices. We agree with Promarisco that it would not be appropriate to exclude the unpaid sales expenses from Promarisco's G&A interest expense, and then include them in the calculation of indirect selling expenses. However, we find that the bad debt expense associated with sales to the customer for which Promarisco did not receive payment would be appropriately included in the margin calculation as a direct selling expense. As the Department noted in Notice of Final Determination Sales at Less Than Fair Value: Stainless Steel Plate in Coils from the Republic of Korea (Stainless Steel Plate in Coils from Korea), 64 FR 15444 (March 31, 1999), and accompanying Issues and Decision Memorandum at Comment 1; and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the Republic of Korea (SSSC from Korea), 64 FR 30664 (June 8, 1999)), and accompanying Issues and Decision Memorandum at Comment 1, it is our practice to "include sales which incur bad debt in the database and treat the bad debt expense as a direct selling expense when the expense is incurred on sales of subject merchandise." As in Stainless Steel Plate in Coils from Korea and SSSC from Korea, given that Promarisco effectively wrote off these expenses as bad debt, we have determined that the bad debt expense should be treated as a direct selling expense, because if not for the sale made to this particular customer, the bad debt expense would not have been incurred. See Promarisco's January 7, 2009, Second Supplemental Section D questionnaire response (SSDQR) at pages 6 - 7, and Exhibit 5, and Promarisco Cost Verification Report at page 26 and cost verification exhibit (CVE) 17. Therefore, as the bad debt directly relates only to subject merchandise sold to a U.S. customer, the appropriate calculation is to allocate the direct selling expense over the total U.S. sales of subject merchandise for the final results. For our calculation of the per-unit direct selling expense, see Promarisco Sales Calculation Memo.

Comment 9: *Treatment of Promarisco's U.S. and Comparison-Market Billing Adjustments*

Promarisco reported in its questionnaire responses that it did not grant any billing adjustments to its U.S. and Spanish sales during the POR. However, at verification, we observed that billing adjustments applied to certain sales. Accordingly, in the Preliminary Results, the Department calculated billing adjustments for certain U.S. and Spanish sales based on information obtained at verification.

The Processors contend that the Department should apply AFA with respect to billing adjustments because Promarisco did not act to the best of its ability to comply with the Department's request, in accordance with sections 776(a)(2)(A) and (B) of the Act. According to the Processors, Promarisco's failure to provide accurate information with respect to billing adjustments prevented the Department from assessing the full impact of these discrepancies on the sales databases, which in turn, undermined the reliability of these databases. Moreover, the Processors assert that AFA is warranted because Promarisco failed to cooperate by not acting to the best of its ability to provide information, pursuant to section 776(b) of the Act, and because it did not put "forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation," as articulated in Nippon Steel at 1382. Therefore, for the final results, the Processors assert that the Department should apply as AFA the highest billing adjustment identified for any U.S. sale at verification to all U.S. sales prices and make no negative billing adjustments to Spanish sales prices.

Promarisco responds that the billing, or post-sale, adjustments that the Department discovered at verification were isolated and nominal, and do not warrant the application of AFA to any other sales. In reviewing each of the sales with post-sale adjustments identified by the Department at verification, Promarisco notes that, while it does not object to the Department's Preliminary Results methodology to make these adjustments, the adjustments range from 0.02 to 0.328 percent of the sales value; thus, they can be considered "insignificant" adjustments under section 777A(a)(2) of the Act and 19 CFR 351.413, which the Department may disregard. Citing NTN Bearing Corp. v. United States, 74 F.3d 1204, 1208 (Fed. Cir. 1995), among other cases, Promarisco maintains that the Department may not apply adverse inferences for inadvertent, clerical errors when a respondent has acted to the best of its ability. Thus, Promarisco contends there is no factual or legal basis to apply the Processors' methodology for this minor reporting error that affected a small number of transactions.

Department's Position:

We agree with Promarisco and have made no change to our Preliminary Results methodology in calculating billing adjustments based on information obtained at verification.

While Promarisco reported that no billing adjustments were applicable to its U.S. and Spanish sales during the POR, we observed at verification that billing adjustments were made on certain sales. See the Department's Memorandum dated February 10, 2009, entitled "Verification of the Sales Questionnaire Response of Promarisco S.A. in the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from Ecuador" (Promarisco Sales Verification Report) at page 15. We thoroughly examined these adjustments at verification and found that their nature and magnitude were not significant enough to call into question the integrity of Promarisco's sales databases and thereby warrant the application of AFA. Moreover, at verification, we found no basis to conclude that Promarisco failed to identify any additional billing adjustments associated with its POR sales. Accordingly, in the Preliminary Results, we adjusted the prices of the affected Spanish and U.S. sales by the actual amount of the unreported billing adjustments found at verification.

This treatment is consistent with past cases where the Department identified adjustments at verification and corrected the questionnaire response data based on the verification findings alone. See, e.g., Brake Rotors from the People's Republic of China: Final Results and Partial Rescission of Fifth New Shipper Review, 66 FR 44331 (August 23, 2001), and accompanying Issues and Decision Memorandum at Comment 3 (where the Department accepted the respondent's minor data omissions and corrections presented at verification); and Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses from Colombia, 60 FR 6980, 6999 (February 6, 1995) at Comment 25 (where the Department accepted the respondent's revisions to its foreign inland freight methodology presented at verification). Therefore, based on the evidence on the record, we have made no change to our Preliminary Results treatment of billing adjustments.

Comment 10: *Payment Date Assigned for Certain U.S. sales*

In the Preliminary Results, the Department assigned a payment date equal to the first day of the sales verification, December 15, 2008, for two sales made to a customer that had gone out of business and for which Promarisco had not received payment. See Promarisco Sales Verification Report at page 20. The Department recalculated the imputed credit expense for those sales using this revised payment date.

The Domestic Producers argue that the Department should assign the date of the case briefs submission, May 1, 2009, as the payment date for these sales and all other sales made to that customer. The Domestic Producers note that, as the verification showed that the customer had gone out of business and Promarisco failed to receive payment from that customer, there is no reason to believe that the customer made payments for any of the other sales made to it, nor that Promarisco has received payment for these sales since the verification.

Promarisco responds that the Department properly applied the first day of the sales verification as a surrogate payment date because it comports with the Department's practice and represents the last date on which Promarisco could submit minor corrections to its data. See Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea, 72 FR 60630 (October 25, 2007), and accompanying Issues and Decision Memorandum at Hansol Comment 3 (where the Department accepted the respondent's use of the first day of verification as the payment date for unpaid sales in order to calculate the imputed credit expense). In addition, Promarisco states that there is no basis to apply the assigned payment date to its other sales to the customer because the Department did not find that the customer failed to pay for the other sales, and only the two invoices in question were identified at the COP verification as generating the bad debt expense in Promarisco's accounting records.

Department's Position:

For the final results we assigned the payment date for the two unpaid sales in question equal to December 31, 2007. As referenced in Comment 8 above, we are now treating the value of the unpaid sales as a bad debt expense. Therefore, for purposes of calculating imputed credit expenses for these sales, we set the payment date to December 31, 2007, the year-end closing date at which Promarisco classified the sales as bad debt. See SSDQR at pages 6 - 7, and Exhibit 5, and Promarisco Cost Verification Report at page 26 and cost verification exhibit (CVE) 17.

The Domestic Producers argue that the Department should assume that all sales to this particular customer were unpaid and apply AFA to the payment date for these sales. However, the Department examined other sales Promarisco made to this customer at verification and found no evidence that these sales went unpaid. Therefore, there is no basis to alter the payment date for these sales as if they were unpaid.

Comment 11: *Treatment of Write-offs in G&A Expenses*

In the Preliminary Results, the Department included various write-offs involving affiliated parties as G&A expenses.[15] Promarisco disputes the Department's treatment of these expenses as G&A expenses. Promarisco asserts that some of these expenses were not written-off and remain on Promarisco's books and records, and therefore, should not be included as a cost. Promarisco further contends that these write-off expenses do not relate to Promarisco's production of the merchandise under consideration but are extraordinary adjustments made due to the acquisition of Promarisco by the Pescanova Group after the POR. In addition, Promarisco asserts that the account balances are expense and income items incurred prior to the POR and fiscal year 2007, and therefore, should be excluded from the G&A expense calculation consistent with the Department's practice to exclude prior-period revisions from G&A expenses, as stated in Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 74 FR 6365 (February 9, 2009), and accompanying Issues and Decision Memorandum at Comment 7 (SSSS from Mexico); and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Butt-Weld Pipe Fittings From Malaysia, 65 FR 81825 (December 27, 2000), and accompanying Issues and Decision Memorandum at Comment 19 (Butt-Weld Pipe from Malaysia).

The Domestic Producers contend that Promarisco's assertions about these write-offs are incorrect and that the Department should continue to include them as part of Promarisco's G&A expenses. The Domestic Producers argue that the write-offs, which Promarisco claims did not occur, appear as expenses in Promarisco's financial statements. Contrary to Promarisco's assertions, the Domestic Producers claim that the write-offs do not constitute extraordinary expenses that should be excluded from reported costs, but are restructuring expenses which the Department does not consider to be unusual. In support of that position, the Domestic Producers cite the Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania, 72 FR 6522 (February 12, 2007), and accompanying Issues and Decision Memorandum at Comment 3 (Carbon Steel Plate from Romania) where the Department continued to include provisions that may not have been typical for the respondent but were not unusual in business; and Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan, 64 FR 24329, 24355 (May 6, 1999) (where the Department rejected the respondent's argument that costs associated with a blast furnace accident were extraordinary because such industrial accidents are neither unusual nor unforeseen in the industry). Finally, the Domestic Producers challenge Promarisco's contention that the expenses do not pertain to the POR, stating that the write-offs all occurred during the POR.

The Processors also support the inclusion of the write-offs in Promarisco's G&A expenses, stating that the Department properly determined at verification that the write-offs should be reclassified to G&A expenses.

[15] Promarisco has requested proprietary treatment for the specific information regarding these write-offs.

Department's Position:

We disagree with Promarisco that the write-offs in question should be excluded from the G&A expense rate calculation. Because the expenses are shown on the audited income statement, Promarisco's assertion that the expenses have not actually been written-off is inaccurate. Promarisco's financial statements are prepared under U.S. Generally Accepted Accounting Principles (US GAAP). Under US GAAP (FAS 5.8), the estimate of a loss should be accrued and therefore reported in the income statement, if the loss is probable and an estimate of the amount can be determined.[16] In this case, Promarisco's auditor determined that the loss was probable and the amount of the loss was known. Because these two criteria were met, US GAAP required that the audited financial statements reflect the losses and related write-offs in the 2007 fiscal year income statement.

We agree that the write-offs are not directly related to production; however, not all costs included in the COP and constructed value (CV) are related directly to production. By definition, G&A expenses and financial expenses do not directly relate to production, but are still included in the COP and CV. We have previously determined that restructuring costs are appropriately included in a company's G&A expenses, and the expenses here are related to the restructuring of the corporate enterprise. See Notice of Final Results of the Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part, 70 FR 71464 (November 29, 2005), and accompanying Issues and Decision Memorandum at Comment 11. Restructuring and integration expenses are costs that are incurred in the normal course of business to streamline the company's continuing operations. Thus, integration and restructuring expenses are costs related to the company's general operations and, as such should be included in COP and CV. See Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber from Canada, 70 FR 73437 (December 12, 2005), and accompanying Issues and Decision Memorandum at Comment 8.

We disagree with Promarisco's assertion that the write-offs at issue are expense and income items incurred prior to the POR and fiscal year 2007. Promarisco's citation to SSSS from Mexico at Comment 7 supporting its position is off point. In SSSS from Mexico, we stated that it is our practice to exclude prior-period revisions from G&A expenses (emphasis added). Specifically, we excluded "the reversal of the provision related to a prior year event." Similarly, Promarisco's cite to Butt-Weld Pipe from Malaysia at Comment 19 is off point. In Butt-Weld Pipe from Malaysia, we stated that "reversals of prior period provisions do not relate to the current period." The write-offs in this case relate to Promarisco's restructuring which occurred in the current G&A expense period (fiscal year 2007) and are not prior-period revisions or reversals of prior-period provisions. Therefore, consistent with SSSS from Mexico and Butt-Weld Pipe from Malaysia, we included these current period expenses in the reported costs.

[16] Financial Reporting Group of Ernst & Young. IFRS/US GAAP Comparison, 3rd Edition. Lexis Nexis, 2005: p. 519.

Comment 12: *Treatment of Promarisco's Interest Income Offset*

In the Preliminary Results, the Department disallowed a portion of Promarisco's claimed interest income offset because the income was derived from long-term sources rather than short-term sources. Promarisco claims that the Department erred in making this adjustment because Promarisco asserts that the interest income is related to short-term financing activities. According to Promarisco, it obtained short-term loans then lent the money to affiliated shrimp farms. Promarisco continues that the interest that the farms owed Promarisco continued to grow as Promarisco extended additional short-term loans to them, and in turn, Promarisco recorded the interest income as a receivable. By including the interest expenses for these loans, but excluding the interest income associated with them, Promarisco contends that the Department improperly inflated Promarisco's interest expenses.

Further, Promarisco argues that the Department accepted Promarisco's interest expense calculation in the LTFV investigation and the first administrative review. Thus, Promarisco contends that the Department's treatment of the interest income in this review and the previous segments of the proceeding are inconsistent.

The Domestic Producers and the Processors assert that the Department correctly excluded this income offset from the interest expense calculation because the income was derived from long-term obligations. Both parties cite the Promarisco Cost Verification Report as establishing that the interest income was properly reclassified as long-term interest income. The Processors note that the Department's practice is to permit interest earned on short-term obligations to offset financial expenses, but not interest earned on long-term obligations, citing as examples Stainless Steel Bar from Italy: Final Results of Antidumping Duty Administrative Review, 69 FR 32984 (June 14, 2004), and accompanying Issues and Decision Memorandum at Comment 3; and Hyundai Electronics Industries Co. v. United States, 342 F.Supp.2d 1141, 1161 (CIT 2004).

Department's Position:

We disagree with Promarisco and have continued to disallow the interest income generated from long-term receivables from affiliates as an offset to financial expenses in the final results. The interest income received by Promarisco from its affiliated farms is the result of the farms' long-term obligations to Promarisco. The Department's practice is to examine the underlying interest-bearing asset that generated the income to determine whether or not the interest income is considered short-term. In calculating the COP and CV, it is the Department's practice to allow a respondent to offset financial expenses with short-term interest income earned from its short-term interest-bearing assets. The CIT has upheld the Department's approach to calculating the financial expense offset with only short-term interest income. See, e.g., Gulf States Tube Division of Quanex Corp. v. United States, 981 F. Supp. 630, 647 (CIT 1997). We continue to find that the interest income earned by Promarisco was not from a short-term interest-bearing asset. See Promarisco Cost Verification Report at page 27.

As for Promarisco's claim that the Department accepted Promarisco's interest expense calculation in the LTFV investigation and the first administrative review, the Department is not bound by prior segment decisions or interpretations. See Fresh Garlic From the People's

Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review, 67 FR 11283 (March 13, 2002), and accompanying Issues and Decision Memorandum at Comment 3 ("{e}ach administrative review is a separate reviewable segment of the proceeding involving ….." and "{w}hat transpired in previous reviews is not binding precedent in later reviews."); see also Shandong Huarong Mach. Co. v. United States, 29 CIT 484, 491 (CIT 2005) "{e}ach administrative review is a separate segment of the proceeding." The Department reviewed the interest income in question in the second administrative review and determined that it was related to long-term interest income. See AR2 Final Results at Comment 3. The record evidence in this review shows that interest income was earned by Promarisco on long-term receivables from its affiliated farms, which is not included in Promarisco's consolidated financial statement. Therefore, consistent with its normal practice, as discussed above, the Department has continued to disallow the long-term interest income from the long-term receivables as an offset to the financial expenses for the purposes of the final results.

Comment 13: *Processing Costs for Block-Frozen Products*

Promarisco states that at verification the Department observed an error in Promarisco's calculation of direct labor, variable overhead, and fixed overhead expenses for a portion of the conversion costs for freezing and packing. According to Promarisco, this error affects only block-frozen products. To correct the error, Promarisco requests that the Department adjust the per-unit direct labor, variable overhead, and fixed overhead costs for block-frozen products based on the differences observed at verification between reported and actual costs.

While the Domestic Producers do not challenge Promarisco's request *per se*, they argue that the computer programming proposed by Promarisco to correct the error is fundamentally flawed. According to the Domestic Producers, Promarisco's proposed programming incorrectly refers to specific product lines for which the proposed cost changes are not found in the Promarisco Cost Verification Report or elsewhere on the record.

Department's Position:

We agree with Promarisco that the errors discovered by the Department should be corrected in these final results. These errors relate to the production quantities processed in the freezing and packing cost center, but they were not corrected for the Preliminary Results due to time constraints. The correct production quantities and their effect on labor, variable overhead and fixed overhead are documented in the Promarisco Cost Verification Report at page 21 and in CVE 11. As a result, we have revised the computer programming language to correct the conversion costs in the cost database to reflect the verified production quantities for the freezing and packing cost center, as detailed in the Promarisco Final Results Cost Calculation Memo.

Comment 14: *Calculation of Entered Value for a Certain U.S. Sale*

In the Preliminary Results, the Department recalculated the entered value for Promarisco's U.S. sales because Promarisco had advised the Department at verification that the value it reported was incorrect in that Promarisco had not deducted international freight expenses. Accordingly, the Department recalculated the reported entered value by subtracting international freight expenses from that amount. Promarisco states that this methodology is acceptable except for one sale, where the recalculated amount is inconsistent with the information in the relevant sales verification exhibit. For this sale, Promarisco asserts that the Department should revise the entered value by relying on the data contained in that verification exhibit.

The Domestic Producers contend that, in fact, the relevant sales verification exhibit does not support Promarisco's proposal. As a result, the Domestic Producers argue that the Department should not apply Promarisco's suggested methodology to revise the entered value amount for this sale. Instead, the Domestic Producers state that the Department should rely on the entered value amount that the Domestic Producers calculated from the verification information.

Department's Position:

We agree with the Domestic Producers and we have recalculated the per-unit entered value for the sale in question based on the entry documentation obtained at verification. As the Domestic Producers note, the relevant verification exhibit includes CBP Form 7501, in which Promarisco declared the entered value for this sale to the U.S. government authority responsible for collecting this information. Promarisco implies that the entered value appearing on Form 7501 is incorrect. However, Promarisco did not provide any documentation to demonstrate that it revised the entered value reported to CBP. Therefore, the Department relied on the entered value appearing on CBP Form 7501 for the sale at issue in the final results.

Songa

Comment 15: *Revision of Count-Size Range Model-Match Coding for Certain Head-On Shrimp Products*

In a February 10, 2009, submission, Songa requested that the Department modify the reporting of count-size ranges for certain head-on shrimp products. Songa stated that the Department's methodology for converting products sold on a per-kilogram basis to the per-pound count-size ranges specified in the Department's questionnaire results in two distinct per-kilogram count-size ranges, 30 to 40 shrimp per kilogram (30/40), and 40 to 50 shrimp per kilogram (40/50), being classified into the same per-pound count-size range of 16 to 20 shrimp per pound, or count-size code 04.[17] According to Songa, this grouping results in significant price distortions when comparing products. To reduce these alleged distortions, Songa proposed that one of the two affected groups of products, the 30/40 group, be reclassified into the next larger count-size range (count-size code 03). The Department did not accept Songa's proposal in the Preliminary Results, stating that, because Songa did not raise the issue until its February 10, 2009, submission, there was insufficient time remaining in this and the concurrent reviews involving shrimp from India, the People's Republic of China, Thailand, and Vietnam to solicit and consider comments on the change to the count-size product characteristic proposed by Songa, as well as to obtain and analyze any revised sales and COP data that may be necessary.

[17] Under this methodology, the mid-point of the 30/40 per kilogram count-size range, 35, when converted to pounds, is 15.88, or 16 shrimp per pound when rounded. The mid-point of the 40/50 per kilogram count-size range, 45, when converted to pounds is 20.41, or 20 shrimp per pound. Accordingly, both of these midpoints fall within the 16-20 shrimp per pound count-size range specified in the questionnaire for model-matching purposes.

Subsequent to the Preliminary Results, Songa asserted that the Department's representations of the timing of Songa's count-size recoding request were in error, as Songa had discussed count-size coding in its questionnaire response and supplemental questionnaire response. In reply, the Department indicated that, regardless of the Preliminary Results having been based solely on what the Department believed to have been the timing of Songa's request, Songa was not precluded from addressing all of the merits of its count-size coding issue in the case and rebuttal briefs. See, Memorandum to the File entitled "Telephone Conversations with Counsel for Songa," dated March 9, 2009 (March 9 Memo). In its May 1, 2009, case brief, Songa addressed both the timeliness and the merits of its count-size recoding arguments. These arguments, and the rebuttals to these arguments, are addressed separately below.

Timeliness of Argument

Songa contends that the Department erred in the Preliminary Results in stating that Songa had not raised the 30/40 count-size coding issue until its February 10, 2009, submission. Rather, Songa claims that it expressly raised this exact same issue in the following three submissions: 1) its August 6, 2008, Section B and C questionnaire response (QRBC); 2) its September 18, 2008, supplemental questionnaire response (SQRBC); and 3) its October 27, 2008, Section D questionnaire response (QRD). In the QRBC, Songa submitted its sales databases with minor count-size coding revisions to the Department's questionnaire instructions that, according to Songa, included the same revision discussed in its February 10, 2009, submission. Songa asserts that it repeated its claims for two count-size coding changes, including the 30/40 change, in the SQRBC. Songa further notes that, in submitting the QRD, it reported two sets of product control numbers (CONNUM), including one set that maintained its QRBC model-match methodology that incorporated the 30/40 change.

Songa acknowledges that the Department rejected its QRBC model-match methodology in the Department's August 28, 2008, supplemental questionnaire, but states that, in doing so, the Department recognized that Songa had made a timely request to modify the model-match methodology with respect to count-size coding. Songa interprets the Department's instructions to indicate that no further analysis of Songa's request was necessary, thus contradicting the Department's Preliminary Results statement that the Department did not have sufficient time to consider the implications of the issue that Songa had raised. Songa adds that the Department erred in the Preliminary Results in citing Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 39940 (July 11, 2008) (Brazil Shrimp), and accompanying Issues and Decision Memorandum at Comment 2, as support for the finding that Songa's model-match revision was untimely because in that case, the respondent did not raise the matter of adding grade to the product-matching criteria until after its verification, while in the instant case, Songa asserts that it first raised the count-size recoding matter in the QRBC.

Moreover, Songa contends that the Department previously has considered requests for revision of the model-matching methodology that an interested party made in its initial questionnaire response. To support that point, Songa cites three cases where the model-matching issue was raised in the context of an initial questionnaire response and addressed in the Department's final determination or final results: Stainless Steel Wire Rod from Sweden: Preliminary Results of

Antidumping Duty Administrative Review, 71 FR 59082 (October 6, 2006) (later litigated in Fagersta Stainless AB v.United States, 577 F. Supp. 2d 1270 (CIT 2008) (Fagersta)); Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part: Certain Pasta from Italy, 68 FR 6882 (February 11, 2003) (later litigated in New World Pasta Company v. United States, 316 F. Supp. 2d 1338, 1342 (CIT 2004) (New World Pasta)); and Notice of Final Determination of Sales at Less Than Fair Value: Emulsion Styrene-Butadiene Rubber From Mexico, 64 FR 14872, 14874-14877 (March 29, 1999).

Finally, Songa insists that its original request for modification of the 30/40 count-size range coding is not different from the request that it made in its February 10, 2009, submission, contrary to the Domestic Producers' statement in their February 17, 2009, submission. While Songa notes that it initially made two separate requests for count-size coding changes, it contends that its request for the 30/40 count-size coding change have remained identical throughout all four of Songa's submissions on this subject. Songa explains that it withdrew its other count-size coding request in its February 10, 2009, submission, so that while the Domestic Producers may be literally correct in stating that Songa's February 10, 2009, request was "different in scope" from its original request, Songa asserts that it was different only because it was narrower than the original request and limited to only the 30/40 count-size coding change. In sum, Songa maintains that it raised the count-size coding issue in a timely manner, with ample time for the Department to consider its request, and that ample time remained after the Preliminary Results to conduct any inquiry and analysis that would have been necessary.

The Domestic Producers contest Songa's claim that it raised the 30/40 count-size coding modification in a timely manner. According to the Domestic Producers, Songa's proposal to employ the count-size code "03" for 30/40 per-kilogram head-on shrimp was not raised until February 10, 2009. Contrary to Songa's representations, the Domestic Producers contend that Songa's previous submissions on model-match revisions were exceptionally aggressive and duly rejected by the Department. In the QRBC, the Domestic Producers state that Songa reported its sales based on a new, three-digit count-size coding scheme that included a number of additional count-size ranges not included in the Department's established model-match methodology for this proceeding. The Domestic Producers continue that the Department properly rejected Songa's count-size reporting in the Department's August 28, 2008, supplemental questionnaire, which instructed Songa to correct its reporting of sales data "to conform exactly to the Department's instructions with respect to CNTSIZT and CNTSIZU" (i.e., the computer variables for reporting the count-size range codes).

The Domestic Producers further note that Songa continued to press its alternative count-size methodology in the SQRBC and the QRD by reporting a second, alternative, set of CONNUMs based on its model-match methodology in addition to reporting CONNUMs based on the Department's questionnaire. Thus, according to the Domestic Producers, Songa did not present its proposal to modify the coding of 30/40 shrimp until February 10, 2009, when Songa abandoned its more aggressive approach and substituted its new alternative. As a result, the Domestic Producers assert that Songa's untimely argument precluded the Department from evaluating the impact of Songa's proposed model-match modification on the companion shrimp reviews. In particular, the Domestic Producers note that Songa's claim that the 30/40 count-size coding modification is based on an industry standard for head-on products contradicts Songa's argument that the issue is specific only to Songa and would have minimal impact on the other shrimp respondents in this and the companion reviews. Therefore, the Domestic Producers conclude that the Department's rationale in the Preliminary Results for rejecting Songa's proposal based on the inability to meaningfully evaluate the impact of the revision on other respondents was fully justified.

Merits of 30/40 Count-Size Coding Change

Citing New World Pasta, 316 F. Supp. 2d at 1353, Songa states that the Department considers both price differences in the marketplace and production cost differences to determine which physical characteristics are meaningful, significant, or commercially significant. According to Songa, the record in this administrative review demonstrates that meaningful physical differences exist among Songa's head-on shrimp products of differing count-size ranges that are reflected in significant differences in both the cost of the raw shrimp that Songa purchases and the selling prices of its finished head-on shrimp products. Songa continues that the Department has preserved every commercially significant physical difference in count size in its count-size coding methodology except for the 30/40 per-kilogram count-size range.

According to Songa, the Department established the count-size ranges based on the standard headless shrimp commercial per-pound count sizes utilized in the Urner Barry seafood price lists. Songa explains that the Department's methodology, which requires that count-size ranges as sold which do not fall squarely within the coding ranges specified in the Department's questionnaire, including head-on shrimp which are normally sold on a count-size per kilogram basis, should be classified based on the midpoint of the range. A consequence of this methodology, Songa continues, is that two normally distinct and separate products sold by Songa, 30/40 per-kilogram count-size shrimp, and 40/50 per-kilogram count-size shrimp, are treated by the Department as the same product (count-size range 04), all other product characteristics remaining equal. This classification, in turn, results in three distortions according to Songa: 1) a 40/50 product may be matched to a 30/40 product sold in the same month, instead of a 40/50 product sold in a different month; 2) no difference-in-merchandise adjustment would be applied to a 30/40 product matched to a 40/50 product (or *vice-versa*) as they would be considered identical products under the Department's methodology, despite their cost differences; and 3) the Department's below-COP test would be distorted because the Department would apply the same average cost to what Songa contends are two commercially different and physically different products. Songa discusses the price and cost differences with specific examples in the SQRBC at pages 4 - 7, the February 10, 2009, submission at pages 4 - 7, and the May 1, 2009, case brief at pages 8 - 12.

Unlike most other shrimp producers the Department has examined, Songa states that it sells mostly head-on shrimp products to the United States, as well as to its comparison market. As a result, Songa continues, no other party has raised this particular count-size comparison issue previously in any segment of this or the companion market-economy shrimp proceedings, because it is not likely that any party believed that collapsing the 30/40 and 40/50 count-size products into one model-matching range would have a significant impact on the Department's analysis. In contrast, Songa asserts that the collapsing of these two sets of products into an identical count-size range code does have a significant impact in the Department's analysis of Songa's data. Songa contends that, in forcing these two sets of products into the same count-size range classification, the Department is acting contrary to law and practice by failing to make proper comparisons of identical and similar merchandise. To support its contention, Songa cites such cases as: Viraj Forgings Ltd. v. United States, 283 F. Supp. 2d 1335, 1340 (CIT 2003) ("Accuracy, as well as the statute, requires Commerce to first look for identical merchandise with which to match the United States model to the comparable home market or third country model."); and Hussey Copper, Ltd. v. United States, 895 F. Supp. 311, 313 (CIT 1995) ("To ensure the accuracy of the antidumping investigation, the products compared must be as similar as possible . . . . Accordingly, Commerce must first look for 'such' merchandise, which is a home market product physically identical to the merchandise sold in the United States. Only if 'such' merchandise is unavailable may Commerce use a physically 'similar' product.").

Given the circumstances described above, Songa contends that it has established "compelling reasons" for the Department to revise its model-matching criteria, consistent with, Fagersta, 577 F. Supp. 2d at 1276-77. The "compelling reasons" Songa cites include greater accuracy in comparing the foreign like product to the single most similar U.S. model and the existence of a "specific standard . . . that is not captured in the model-matching criteria but which is industry-wide, commercially accepted and recognizes material physical characteristics of various types for the particular product at issue." Songa argues that the Department's arbitrary and erroneous assignment of the same count-size code to the 30/40 and 40/50 products prevents the Department from making the more accurate comparison by matching them separately. Further, Songa claims that the count-size coding fails to make the industry-wide and commercially-significant distinction between 30/40 count and 40/50 count head-on shrimp.

Songa acknowledges that it is requesting a model-match revision not previously sought by any other party in any other shrimp proceeding. However, Songa contends that the Department has accepted changes to the model-matching criteria applicable to a single respondent in previous cases. Among the examples cited by Songa in support of this proposition are three previous shrimp proceedings. In Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 76918 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 11 (Thai Shrimp), Songa states that the Department allowed a single respondent, Thai I-Mei, to use its "as sold" count sizes even though those count sizes did not correspond to those that the other mandatory respondents in that investigation calculated using the Department's "midpoint" conversion methodology. In LTFV Final Determination at Comments 7 and 8, Songa notes that the Department accepted one Ecuadorian producer's claim to add two additional physical characteristics to the model-matching criteria, grade and organic status, because the respondent demonstrated that these characteristics were commercially meaningful and resulted in significant differences in price and cost. Finally, Songa points to Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China, 69 FR 70997 (December 8, 2004), and accompanying Issues and Decision Memorandum at Comment 1(PRC Shrimp), where Songa states that the Department derived count-size-specific surrogate values for raw shrimp for each of the "standard derived count sizes based on Urner Barry data." Songa addressed the Domestic Producers' February 17, 2009, objections to these case citations as first presented in Songa's February 10, 2009, submission, by offering a series of rebuttals, highlighting that, according to Songa, each of these cases demonstrated that, under appropriate circumstances such as the instant one, the Department has permitted respondent-specific modifications to the model-matching criteria originally issued in the relevant shrimp proceeding.

The Domestic Producers dispute Songa's assertion that the Department intended to preserve the count-size distinctions expressed in the Urner Barry price lists for establishing the count-size ranges used in the Department's model-match methodology, which Songa suggests generated improper matches for head-on shrimp products. Rather, the Domestic Producers contend that the reason that the Department requires all count-size ranges to be reported according to a per-pound methodology is only to ensure that all count sizes are reported on a consistent basis, and while the count-size ranges may be virtually identical to the headless shrimp count-size ranges published by Urner Barry, that fact is inapposite to whether the Department intended to preserve the head-on count sizes published by Urner Barry.

The Domestic Producers further challenge Songa's claims regarding cost and price differences related to the count-size coding. According to the Domestic Producers' analysis, the variable cost difference between the 30/40 and 40/50 count-size products sold in the comparison market, and the same products sold in the U.S. market, do not have a significant impact on the Department's margin calculations. Similarly, the Domestic Producers contend that their analysis of the sales price dispersion between these two sets of products do not demonstrate that Songa is adversely affected by the Department's count-size reporting methodology.

With respect to Songa's reliance on previous shrimp proceedings in support of its proposed count-size range coding change, the Domestic Producers contend that those determinations are not on point. According to the Domestic Producers, in Thai Shrimp, the issue was not whether it was appropriate to allow the respondent to report different count-size codes, but rather whether it was appropriate for the respondent to report its non-standard count-size codes based on the manner in which the company actually produced and sold the shrimp, rather than on the hypothetical manner in which the shrimp was sold. The Domestic Producers add that the Thai Shrimp respondent in question had no viable comparison market, so the company's NV was based on CV and no model matching was involved. With regard to LTFV Final Determination, the Domestic Producers state that the matter at issue was whether to include new, additional, physical characteristics to the model-match methodology, rather than altering the reporting of one of the preexisting physical characteristics. In the PRC Shrimp example, the Domestic Producers assert that the issue addressed was the selection of the surrogate values for head-on shrimp as raw material, and thus was unrelated to the matter of count-size ranges for model-matching purposes.

Department's Position:

The Department has considered Songa's arguments for the final results and has determined that it is appropriate to modify the count-size range coding for Songa's 30/40 per-kilogram count-size shrimp to account for an unintended consequence resulting from the conversion of count-size-specific categories from kilograms to pounds. The basis for this decision is discussed in detail below.

Timeliness:

In the Preliminary Results, citing Brazil Shrimp, we stated that "{o}ur normal practice is to consider proposed changes to product-matching criteria in the very early stages of a proceeding, to allow adequate time for all parties to comment on such proposed changes and for the Department to properly analyze them before making a determination." We also stated that "issues involving product-matching characteristics, including classifications within a given characteristic, cannot be analyzed only in the context of one respondent's reported data, as they have the potential to impact other respondents in this segment of the proceeding and the current segments of the companion proceedings involving shrimp from India, the People's Republic of China, Thailand, and Vietnam." On this basis, we rejected the count-size range recoding proposal that Songa presented in its February 10, 2009, submission.

A review of the complete record in this case indicates that Songa proposed an alternative count-size matching methodology to correct the kilogram-to-pound conversion discrepancy prior to February 10, 2009, in the QRBCD. Songa's alternative, however, was originally not presented in a submission requesting the Department to consider its proposed modification, but rather as a *fait accompli* in its QRBCD submission. Moreover, in its questionnaire response, Songa combined the alternative conversion methodology with several other unilateral changes to the Department's prescribed count-size ranges by using a three-digit coding instead of the established two-digit coding, by adding three count-size ranges, and by assigning new codes for head-on shrimp based on Songa's own commercial distinctions among head-on products. This methodology marked a significant departure from the count-size ranges established by the Department prior to the LTFV investigation preliminary determination, and used consistently in all segments of this and the companion shrimp proceedings since then. Nevertheless, we acknowledge that Songa discussed the 30/40 and 40/50 count-size coding issue at page C-6 of the QRBCD, stating that the Department's methodology "introduces a significant distortion by assigning the same count-size code to two distinct products that have different raw material costs and finished product prices."

At page 2 of the August 28, 2008, supplemental questionnaire, the Department instructed Songa to revise its response to comply with the questionnaire instructions as follows:

> As Songa acknowledged at page C-6 of the response, it did not report control numbers (CONNUMT and CONNUMU) or product count-size (CNTSIZT and CNTSIZU) in full conformity with the Department's instructions at pages B-9 – B-10 and C-9 –C-10 of the Department's antidumping duty questionnaire, nor with the reporting methodology adopted in the less-than-fair-value (LTFV) investigation and applied consistently in each subsequent review of this order and the companion orders on frozen warmwater shrimp from Brazil, India, the People's Republic of China, Thailand, and Vietnam. Accordingly, revise the response and the databases to conform <u>exactly</u> to the Department's instructions with respect to CNTSIZT and CNTSIZU. Consistent with the methodology adopted in the LTFV investigation (and recognized by Songa at pages C-5 – C-6 of the response), for products normally classified by count-size per kilogram, determine the midpoint of the count-size range as sold and convert that figure into pounds by dividing it by 2.204. Round the result to the nearest whole number and use that result to determine the appropriate CNTSIZT or CNTSIZU.
> (*Emphasis in original*)

Songa complied with the Department's instructions in the SQRBC. However, Songa also continued to argue that the Department should adopt its three-digit count-size coding methodology. Songa's justification for its methodology included additional discussion concerning the 30/40 and 40/50 count-size issue. See SQRBC at pages 3 – 7. Songa also included its count-size coding methodology in the QRD as an alternate to the Department's count-size coding.

Thus, between its QRBC and its February 10, 2009, submission, Songa had proposed an alternative methodology for count size ranges within the count-size physical characteristic that included placing the 30/40 and 40/50 count-sizes into different ranges, but that aspect of its proposal was part of a more extensive alteration to the Department's established methodology. As the Domestic Producers noted, Songa recanted its argument in the February 10, 2009, letter, focusing solely on the alternative count size range coding for 30/40 products using the Department's established two-digit coding system. Where previously the 30/40 product recoding was one part of a more comprehensive revision of the count-size model-matching methodology, Songa's February 10, 2009, submission made it the sole change in its proposal. It is in this context that the Department viewed the February 10, 2009, proposal as a new argument in the Preliminary Results. However, after a thorough review of the information Songa submitted prior to the Preliminary Results, we have reconsidered our finding in the Preliminary Results that Songa's February 10, 2009, count-size coding change request was untimely. As discussed more fully below, we find that the modification proposed by Songa does not constitute a fundamental change to the model-match characteristics established in the LTFV investigation. Rather, Songa's proposal is limited to the kilogram-to-pound conversion methodology employed with respect to one particular group of products classified within an existing physical characteristic employed in the Department's model-match methodology. As such, upon reconsideration, we find Songa's request to correct the unintended consequence of the Department's conversion methodology to be timely submitted.

Merits:

While Songa is incorrect in implying that the Department adopted the count-size ranges in its model-matching methodology in part to treat head-on shrimp as headless shrimp, the Department did intend to reflect widely-observed commercial distinctions in order to identify unique products in terms of "as sold" shrimp count size. As we explained in Thai Shrimp, we established the count-size ranges, including midpoint selection methodology, for the purpose of count-size reporting standardization in the frozen warmwater shrimp proceedings. While the Department may have relied upon the Urner Barry headless shrimp count-size ranges for guidance in demarcating the ranges, these ranges also served to place the common head-on, per-kilogram count sizes into separate ranges. However, as highlighted by Songa in this review, the notable exception in separating head-on count-size ranges was with respect to the 30/40 and 40/50 per-kilogram count sizes, which both fall into the "04" count-size range.

Until the instant review, no party had raised any concerns regarding the 30/40 and 40/50 count-size issue. As Songa notes, it may be the first respondent to be examined in any of the shrimp proceedings that sells a high proportion of head-on shrimp to the United States, and therefore, may be the first respondent for which the conversion of its head-on count sizes according to the Department's model-matching methodology has a significant impact on price comparisons. In its case brief, as well as in several previous submissions, Songa identified significant gross price differences between the 30/40 and 40/50 count-size shrimp. We performed our own analysis of Songa's sales data, in which we compared sales of identical CONNUMs in each market that

Songa identified as either 30/40 or 40/50 per-kilogram head-on shrimp. We observed that, within the same market, the 30/40 shrimp were sold consistently at significantly higher gross prices than the otherwise-identical 40/50 shrimp. Similarly, our examination of the COP databases showed that Songa reported significantly higher costs for 30/40 shrimp than 40/50 shrimp with the same CONNUM. See Songa Cost Calculation Memo.

Although the Domestic Producers purport to refute Songa's price and cost comparisons, we note that the Domestic Producers analyzed different sets of products than Songa analyzed. The Domestic Producers did not compare prices and costs in the same market between certain products within the same count-size range as Songa did. Rather, the Domestic Producers compared all products in one market of one count-size range to those products in the other market with the same count-size range. Therefore, it is not surprising that each party arrived at a different conclusion. However, the issue at hand is whether or not the Department's count-size coding methodology results in the unintended consequence of two distinct count-size categories being merged into one as a result of the conversion process, thus failing to sufficiently account for differences in the count-size physical characteristic. Our analysis leads us to conclude that it does.

Beginning with the LTFV investigations, the Department has had the opportunity to examine sales of shrimp products through four segments of the shrimp proceedings. While we have observed that most U.S. sales have been of headless products, a number of respondents across the proceedings have sold substantial quantities of head-on products to their respective comparison markets. For example, in the instant review, the other respondent, Promarisco, sells significant quantities of head-on shrimp to its comparison market. Our analysis of Promarisco's Spanish sales database, which includes a detailed product code, shows that its head-on shrimp products are sold in 30/40 and 40/50 count sizes. Thus, we can accept Songa's contention that 30/40 and 40/50 count sizes represent common industry-wide, commercially accepted count-size ranges with respect to sales of head-on shrimp. Because of the observed significant price and cost differences between 30/40 and 40/50 per-kilogram count-size shrimp, as discussed above, by recoding 30/40 per-kilogram shrimp to reflect a separate count-size range from 40/50 per-kilogram shrimp, we obtain greater accuracy in comparing the foreign like product to the single most similar U.S. product, consistent with section 771(16)(B) of the Act. Accordingly, we have made the requested change to the count-size coding of 30/40 shrimp in the final results. See Songa Cost Calculation Memo for additional information on the Department's revision of the count-size range coding.

Making this minor modification to the conversion methodology in the final results does not disturb the basic model-match methodology adopted for this and the companion shrimp proceedings. Nevertheless, the Department ordinarily would attempt to apply such a modification across all respondents and all companion proceedings. However, as this issue was not raised in the concurrent shrimp reviews, at this late stage, we have no basis to consider this change in those reviews. Although there will be no further reviews of this order, as it has been revoked (see Implementation of the Findings of the WTO Panel in United States Antidumping Measure on Shrimp from Ecuador: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Ecuador, 72 FR 48257 (August 23, 2007)), the Department intends to apply this change to the count-size range characteristic coding in all subsequent reviews of the companion orders on shrimp.

Comment 16: *Completeness of Indirect Selling Expense Reporting*

The Domestic Producers contend that Songa failed to include in its calculation of the indirect selling expense ratio certain G&A expenses it incurred that are normally treated as indirect selling expenses.[18] The Domestic Producers state that it is the Department's longstanding practice to treat all expenses incurred by affiliated sales arms, the sole purpose of which is selling merchandise, as indirect selling expenses. See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of New Shipper Reviews, 67 FR 10665 (March 8, 2002), and accompanying Issues and Decision Memorandum at Comment 5 (TRBs from the PRC). Accordingly, the Domestic Producers assert that all of the expenses incurred by any such entities in this administrative review should be classified as indirect selling expenses and included in Songa's indirect selling expense ratio.

Songa responds that it reported all of the selling expenses it was required to report. Songa states that a review of QRBC Exhibits B-11 and C-15, as well as Exhibit F-5 to the Songa CVR, demonstrates that Songa included the appropriate expenses in question as part of its indirect selling expense calculation.

Department's Position:

We agree with the Domestic Producers that certain expenses originally reported by Songa as G&A expenses should be included in the calculation of Songa's indirect selling expense ratio. During the course of the review, the Department instructed Songa to revise its originally-reported G&A and financial expenses to rely on Songa's unconsolidated financial statements. Songa complied with the Department's request (see Songa's January 29, 2009, response (SQRD) at Exhibits SD-41 and SD-44), which resulted in certain expenses being excluded from the G&A and financial expense calculations. While Songa is correct that it reported all of the appropriate selling expenses, it did not revise its calculation of indirect selling expenses to account for the SQRD revisions to its G&A and financial expenses. As a result, certain sales-related expenses were omitted from the calculations of NV, EP, or COP. Therefore, to fully account for all sales-related indirect expenses, we have recalculated Songa's indirect selling expense ratio to include the expenses in question, consistent with such cases as TRB from the PRC. See Songa Cost Calculation Memo for the explanation of the indirect selling expense recalculation.

Comment 17: *Inclusion of Foreign Exchange Losses in Songa's Financial Expense Ratio*

In the Preliminary Results, the Department revised Songa's reported financial expense rate to include in the numerator of the calculation an amount for the amortization of a currency exchange rate loss. Songa objects to this inclusion, contending that the adjustment reflects the amortized portion of the exchange rate loss that Songa incurred due to the conversion from the sucre to the U.S. dollar in 2000. Moreover, Songa states the Department observed at verification

[18] Business proprietary treatment has been requested for certain details of this issue.

that Songa did not incur currency exchange gains or losses during the POR because the U.S. dollar is Ecuador's unit of currency, and all expenses and income are in U.S. dollars.

Songa explains that Ecuadorian law allowed companies to establish a deferred asset (deferred charge) equal to the amount by which liabilities exceeded assets, after the conversion of foreign liabilities into sucres and prior to the conversion to the U.S. dollar in April 2000. Songa states that the law also allowed companies to amortize this deferred asset account over a five-year period, later extended to ten years, and thus its financial statement covering the POR includes a portion of that amortization. However, Songa stresses that the amount at issue is not a financial expense it incurred during the POR.

Songa asserts that under identical circumstances in the underlying LTFV investigation, the Department excluded the amortization from the numerator of the financial expense ratio. See LTFV Final Determination at Comment 20. In support of its contention, Songa refers extensively to this determination and two cases cited in it: 1) Final Results of the Administrative Review of the Antidumping Duty Order on Silicomanganese from Brazil, 69 FR 13813 (March 24, 2004), and accompanying Issues and Decision Memorandum at Comment 14, (Silicomanganese from Brazil), wherein the Department stated that "the only truly accurate way to account for such exchange gains and losses is to recognize the full impact of such gains and losses in the year incurred;" and 2) Micron Technology, Inc., v. United States, 893 F. Supp. 21 (CIT 1995) (Micron), wherein the Korean respondents had amortized foreign exchange translation losses in accordance with Korean GAAP. In Micron, Songa notes that the CIT upheld the Department's rejection of Korean GAAP and instead expensed the losses. Songa distinguishes the instant case from Micron by pointing out that it incurred its currency exchange losses years before the POR, while the respondents in Micron incurred their losses during the period of investigation.

Thus, Songa concludes, consistent with Department practice and court precedent, as discussed above, that all of Songa's exchange rate losses should be attributed to the specific years in which they were incurred. In the instant case, Songa contends that the Department has no factual or legal basis to increase Songa's financial expense by the amortization of exchange rate losses during the POR where those losses were incurred before the start of the POR.

The Processors assert that the Department properly included the amortized portion of Songa's exchange loss in Songa's financial expense. According to the Processors, Department practice is to include such an expense. In support of their position, the Processors cite two cases where the Department included amortized deferred foreign exchange losses: Stainless Steel Wire Rod From Korea: Final Results of Antidumping Duty Administrative Review, 67 FR 6685 (February 13, 2002), and accompanying Issues and Decision Memorandum at Comments 2 and 3 (SSWR Korea); and Stainless Steel Plate in Coils From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 66 FR 64107 (December 11, 2001) and accompanying Issues and Decision Memo at Comment 15 (SSPC Korea).

Department's Position:

We agree with Songa. It is the Department's established practice to recognize all exchange rate gains and losses in the year incurred. Section 773(f)(1)(A) of the Act states that "costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." While we agree that in its normal books and records Songa recorded the amortized portion of the exchange rate loss, in this instance, this methodology does not reasonably reflect the costs associated with the production and sale of the merchandise in the period under review. Therefore, we have excluded the deferred amortized exchange rate loss from the calculation of the financial expense rate for the final results.

Based on the information on the record and examined during verification, the exchange rate loss reported in Songa's 2007 financial statements was clearly an amortized portion of a translation loss incurred prior to the period under review (see Songa CVR at pages 3 and 33). As stated by Songa and confirmed in the footnotes to Songa's 2007 audited financial statements, the Ecuadorian government allowed companies to establish deferred asset accounts to mitigate the effects of the unrealized translation losses experienced due to the significant devaluation of the country's former currency, the sucre, during 1999. The deferred asset account was then amortized over a ten-year period, at the discretion of the company, starting in 2000. The exchange rate loss currently under discussion is the 2007 amortized portion of this deferred asset account. Thus, the loss clearly originated in a period prior to the one currently under review. With regard to exchange rate gains and losses, the Department is persuaded that the most meaningful reflection of the financial impact of exchange rate gains and losses on a company is the recognition of the full impact of such gains and losses in the year incurred. See LTFV Final Determination at Comment 20. Therefore, the Department concurs with Songa's conclusion that, consistent with Department practice and court precedent, all of Songa's exchange rate loss should be attributed to the specific year in which it was incurred.

An exception to the Department's established practice to recognize all exchange rate gains and losses in the year incurred can be found in Certain Steel Concrete Reinforcing Bars from Turkey: Final Results of Antidumping Duty Administrative Review and Determination to Revoke in Part, 73 FR 66218 (November 7, 2008) and accompanying Issues and Decision Memorandum at Comment 3 (Turkish Rebar) where we stated:

> In this case, Ekinciler concedes that Turkish accounting standards permitted it to capitalize these expenses because of the 2000-2001 currency crisis. It appears that, when faced with a major currency crisis, the Turkish authorities allowed companies in Ekinciler's position to capitalize their significant foreign exchange losses. One can sympathize with the Turkish government's motivations for allowing such treatment, as virtually overnight, the debts of these companies grew significantly through no activity or transaction of their own. Under normal economic conditions it is reasonable and appropriate to expense the entire foreign exchange losses in the year in which they are incurred, because the foreign exchange losses are deemed to be associated with the accounting period and the foreign loan. Normal accounting standards would call for the entire amount to be recognized in that accounting period, even when the actual loans themselves may not be payable for several years…However, in severe economic conditions, foreign exchange losses can reach amounts that are larger than the original loan value. These losses were certainly significant in the case of Ekinciler. Under such conditions, it may not be reasonable to force the company to immediately expense the entire foreign exchange losses…Accordingly, it

> may be reasonable to capitalize and amortize such costs and to include an amount in the cost of production.

The primary difference between the LTFV Final Determination, in which we followed our practice to recognize all exchange rate gains and losses in the year incurred and excluded Exporklore's deferred amortized exchange rate loss from the calculation of the financial expense rate, and Turkish Rebar is in the magnitude of the loss suffered by Ekinciler. In Turkish Rebar, we found that it was not unreasonable for the respondent, in its normal books and records, to capitalize the extremely large foreign exchange loss that occurred due to unusual economic conditions.

We note that in the cases cited by the Processors, the Department isolated the foreign exchange losses associated with the foreign-denominated debt which were not incurred during the POR, and amortized the losses over the life of the loans. See SSPC Korea at Comment 15 ("POSCO contends that in order to ensure consistency with precedent, the Department should amortize the losses over the life of the corresponding liabilities.") and SSWR Korea at Comment 2 ("…the write off represented the remaining balance of exchange losses associated with foreign currency loans outstanding in December 1997.") The cited cases reflect the Department's practice before the change announced in Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 11045, 11048-11049 (March 7, 2003) which stated:

> For these preliminary results, we have implemented a change in practice regarding the treatment of foreign exchange gains and losses. The Department's previous practice was to have respondents identify the source of all foreign exchange gains and losses (e.g., debt, accounts receivable, accounts payable, cash deposits) at both a consolidated and unconsolidated corporate level. At the consolidated level, the current portion of foreign exchange gains and losses generated by debt or cash deposits were included in the interest expense rate computation. At the unconsolidated producer level, foreign exchange gains and losses on accounts payable were either included in the G&A rate computation, or under certain circumstances, in the cost of manufacturing. Gains and losses on accounts receivable at both the consolidated and unconsolidated producer levels were excluded from the COP and CV calculations. Instead of splitting apart the foreign exchange gains and losses as reported in an entity's financial statements, we will normally include in the interest expense computation all foreign exchange gains and losses. In doing so, we will no longer include a portion of foreign exchange gains and losses from two different financial statements (i.e., consolidated and unconsolidated producer). Instead, we will only include the foreign exchange gains and losses reported in the financial statement of the same entity used to compute each respondent's net interest expense rate. This approach recognizes that the key measure is not necessarily what generated the exchange gain or loss, but rather how well the entity as a whole was able to manage its foreign currency exposure in any one currency. As such, for these preliminary results, we included all foreign exchange gains or losses in the interest expense rate computation. We note that there may be unusual circumstances in certain cases which may cause the Department to deviate from this general practice. We will address exceptions on a case-by-case basis.

Therefore in accordance with our practice, for the final results, we have excluded the amortized portion of the deferred exchange loss that originated in a prior period from Songa's financial expense calculation.

Comment 18: *Treatment of Depreciation for Revalued Fixed Assets in Fixed Overhead Costs*

In the Preliminary Results, the Department revised Songa's reported fixed overhead costs to include depreciation expense on the revaluation of fixed assets. Songa disputes this revision, arguing that it incurred this depreciation expense as a result of Ecuador's conversion to the U.S. dollar, when assets valued in Ecuadorian sucres were revalued into U.S. dollars. According to Songa, the revaluation caused a loss of value of the assets, but Ecuadorian accounting standards permitted this loss of value to be offset by increased depreciation. Similar to the foreign exchange loss amortization issue described above, Songa contends that this depreciation relates to an event that occurred several years prior to the POR and, as it is not related to production of the subject merchandise during the POR, it should be excluded from fixed overhead costs.

Songa further argues that the recent decision in Nucor Corporation v. United States, Slip Op. 09-30, Consol. Court No. 07-00457 (Ct. Int'l Trade, April 14, 2009) (Nucor) supports its position. According to Songa, in Nucor, the CIT rejected the Department's imputed depreciation on a respondent's fixed asset account which consisted almost entirely of foreign exchange losses on loans caused by the devaluation of the Turkish currency several years prior to the POR. Songa states that the CIT held that the Department's imputed depreciation did not reasonably reflect production and sale costs incurred during the POR and thus was inconsistent with the Department's stated policy to treat foreign exchange losses as expenses in the year incurred.

Both the Domestic Producers and the Processors assert that the Department's inclusion of Songa's depreciation expenses on the revaluation of fixed assets in Songa's fixed overhead costs was appropriate and consistent with Department practice. Each of these parties lists several cases they contend support their position, such as: Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52061 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 5; and Light-Walled Rectangular Pipe and Tube From Mexico: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 53677 (September 2, 2004), and accompanying Issues and Decision Memorandum at Comment 21[19] (Pipe and Tube from Mexico).

Department's Position:

We agree with the Domestic Producers and the Processors. For the final results, we have continued to include the depreciation expense related to the revaluation of fixed assets in Songa's fixed overhead costs. We have consistently treated increases in fixed asset values due to revaluation as an increase in the fixed asset's depreciable base. See Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Notice of Final Determination of Sales at Less than Fair Value, 66 FR 49622 (September 28, 2001), and accompanying Issues and Decision Memorandum at Comment 1. Section 773(f)(1)(A) of the Act states that "costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." The record shows that Songa calculated and included depreciation based on the revaluation of its fixed assets in its normal books and records, in

[19] The Processors incorrectly cited Comment 6 in their rebuttal brief.

accordance with Ecuadorian GAAP, which is reasonable. At the time of conversion to the U.S. dollar, the Ecuadorian government and accounting authorities recognized that the historical fixed asset values did not fairly reflect the real asset values in current currency terms, and were thus significantly understated (see Songa CVR at pages 15 and 16). Accordingly, Songa revalued its fixed assets and calculated its depreciation expense using these revalued fixed asset amounts in order to report its depreciation expense based on the revalued fixed asset amounts at current currency levels.

In cases involving countries whose economies, while not reaching the high inflation methodology threshold of 25 percent during the period examined, nonetheless are continually marked by high inflation from year to year, the Department normally adjusts the respondent's depreciation expense for inflation in order to permit a more appropriate matching of costs and prices based on equivalent currency units. See Magnesium Metal from the Russian Federation: Notice of Final Determination of Sales at Less-than-Fair Value, 70 FR 9041 (February 24, 2005), and accompanying Issues and Decision Memorandum at Comment 9. In this case, however, we are not adjusting Songa's depreciation expense in its normal books and records. Rather, we are relying on the depreciation expense as calculated in its normal books and records.

The case cited by Songa does not support its position. In Nucor, the Court ruled that the asset in question was not a fixed asset at all, but capitalized foreign exchange losses due to the devaluation of the Turkish lira. Songa's situation relates to fixed assets that were revalued due to the loss of value of the Ecuadorian sucres when converted into U.S. dollars. Songa's revaluation of its fixed assets is not an exchange gain or loss that occurred in a prior period. The revaluation brings Songa's fixed asset value to the currency level at the date of restatement. The depreciation calculated based on the revalued assets represents the current cost associated with holding these assets. See Pipe and Tube from Mexico at Comment 21. As such, the depreciation on the revaluation of the fixed assets should be included in Songa's reported costs. Therefore, for the final results, we have continued to include the depreciation expense related to the revaluation of fixed assets in Songa's fixed overhead costs.

Comment 19: *Amortization of the Cost of Export Certificates in Financial Expenses*

In the Preliminary Results, the Department recalculated Songa's financial expenses to include the amortization of the cost of the export certificates issued by Corpei, a private export and investment promotion corporation. Songa contends that it properly excluded this cost from its financial expenses because the cost relates to export certificates issued prior to the POR. According to Songa, the Department observed at verification that the Corpei certificates are issued to each exporter and, therefore, it may be more appropriate to include the cost as an indirect selling expense, rather than a financial expense.

The Domestic Producers contend that the Department's verification showed that Songa treated the export certificates as long-term investments, thus the Department should continue to treat the cost of the amortization of these long-term investments as financial expenses. The Domestic Producers add that it is not relevant that the export certificates were issued and obtained prior to the POR because Songa treated the amortization cost as part of its POR costs.

The Processors also argue for the inclusion of the cost of the amortization of the export certificates in Songa's financial expenses because, they note, Songa included the cost as a financial expense in its 2007 income statement. Further, they assert that this cost is akin to amortized exchange losses which the Department found to represent an additional cost of financing to the company and included in financial expenses, as discussed in SSWR Korea at Comment 2.

Department's Position:

We agree with Songa, in part. The amortization of the cost of the Corpei export certificates should be excluded from the financial expense rate calculation, not because the export certificates were issued prior to the POR, but because they are a sales-related expense. Based on the information on the record and examined during verification, the costs associated with the certificates resulted from Songa's export activities and its participation in the Corpei export promotion company. Corpei was created through the Foreign Commerce and Investment Law, and is recognized by the Government of Ecuador as the official body in charge of the promotion of exports and investments in Ecuador. The fee paid for the export certificate is based on the value of export sales (see Songa CVR at page 32) and should, therefore, be considered an indirect selling expense. For the final results, we excluded the amortization of the cost of the Corpei export certificates from the financial expense rate calculation and included this cost as an indirect selling expense. See Songa Cost Calculation Memo and Songa Cost Calculation Memo.

Comment 20: *Inclusion of Profit Sharing Expenses in G&A Expenses*

In the Preliminary Results, the Department adjusted Songa's G&A expenses to include employee profit sharing costs for 2007. Songa contends that these costs are not an operational expense and should not be included in the G&A ratio calculation. According to Songa, under Ecuadorian law, profitable companies are required to pay a share of their profits to employees and, therefore, this requirement is equivalent to a tax that is paid to employees rather than to the Ecuadorian Treasury.

Both the Domestic Producers and the Processors contend that the Department properly included the profit sharing expenses in the G&A expense calculation. They state that the Department's practice is to include these expenses as G&A expenses, as discussed in Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review, 73 FR 7710 (February 11, 2008), and accompanying Issues and Decision Memorandum at Comment 8.[20]

Department's Position:

We agree with the Domestic Producers and the Processors. The Department typically treats profit sharing costs as G&A expenses in the calculation of COP and CV because profit sharing is a benefit bestowed on the employees of the company. See Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review, 74 FR 6365 (February 9, 2009), and accompanying Issues and Decision Memorandum at Comment 7; see

[20] The Domestic Producers incorrectly cited Comment 7 in their rebuttal brief.

also Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil: Notice of Final Determination of Sales at Less than Fair Value, 65 FR 5554 (February 4, 2000), and accompanying Issues and Decision Memorandum at Comment 22 ("Because employee profit sharing is a cost of labor and it is an expense recognized within the POI, it should be included in the reported cost…"). In addition, we note that it is not appropriate to treat employee profit sharing expenses like an income tax payment, as it is not a payment made to the government. Therefore, for the final results, we have continued to include employee profit sharing expenses in Songa's G&A expense calculation.

Comment 21: *Offset Adjustment to G&A Expenses for Certain Non-Operating Income Items*

Songa states that, as demonstrated at verification (Songa CVR at pages 3, 30, and 31), it included the cost and corresponding income earned on certain items in its G&A expense calculation, but inadvertently omitted the income from sales of packaging materials, co-packaging income, income from earned on sales of freezing services, income on sales of fixed assets, and lease-related items. Therefore, Songa contends that, to avoid overstating Songa's COM to produce the merchandise under consideration, the cost of these items included in COM should be offset through a corresponding adjustment to the G&A calculation for income related to the sale of these items.

The Domestic Producers respond that, if the Department were to accept Songa's representations and include the offsetting income for these items in the G&A expense calculation, then the Department should also include the fees paid by Songa to obtain VAT refunds, as discussed in the Songa CVR at pages 3 and 29.

Department's Position:

We agree with Songa and the Domestic Producers. Based on the information on the record and examined at verification, in its normal books and records, Songa recorded packaging material sales income, co-packaging income, freezing income, income on the sales of fixed assets and lease-related items under non-operating income but the related costs were included in COM. Because the expenses related to these income items are included in the reported costs but the revenue is not, and because the expenses at issue closely approximate the related revenue amounts, for the final results, we included the offsetting revenue in Songa's G&A expense calculation.

Songa also excluded professional fees it paid to obtain VAT refunds. For the final results, we included the VAT refund fees paid in Songa's G&A expense calculation.

Recommendation

Based on our analysis of the comments contained in the briefs received, we recommend adopting all of the above positions. If this recommendation is accepted, we will publish the final results of review and the final weighted-average dumping margins for the reviewed firms in the Federal Register.

Agree ___ Disagree ____

____

Ronald K. Lorentzen
Assistant Secretary
for Import Administration

____
(Date)